Citibank Bhd v Pembangunan Cahaya Tulin Sdn Bhd (receivers and managers appointed) & Ors and other suits

HIGH COURT (KUALA LUMPUR) — SUIT NOS D6–22–1016 OF 2005, D-2283 OF 2008, D-2284 OF 2008, D-2285 OF 2008 AND D-2286 OF 2008
LEE SWEE SENG JC
5 APRIL 2012

Evidence — Parol evidence rule — Terms of written agreements contradicted — Bank sued for amount owing for credit facilities granted — Borrower's repayments set off against rentals payable by bank for leasing borrower's building — Borrower alleged bank promised to occupy building for 40 years or until facilities fully repaid — Whether evidence of oral representations to that effect admissible to contradict/vary documentary evidence — Evidence Act 1950 s 92

The plaintiff sued the first defendant ('D1') as borrower, the second defendant ('D2') as corporate guarantor and the third and fourth defendants as personal guarantors to recover sums owing in respect of credit facilities granted to D1. The defendants contended that D1 was not liable because the plaintiff had breached a collateral contract and certain oral representations it had made in relation to the grant of the facilities. The defendants said there was a collateral oral agreement that D1 was to use the facilities granted to (i) acquire land, construct and furnish a 12 storey building ('Wisma CY') for the plaintiff to lease for 40 years and (ii) acquire another piece of land adjacent to Wisma CY for the construction of an 18 storey building, also to be used by the plaintiff ('the second building'). The rental the plaintiff would pay to occupy Wisma CY was to be set off against the loan repayments under the credit facilities. The defendants claimed the plaintiff breached several oral representations it had made, among which was that it would lease Wisma CY for 40 years or at least until the credit facilities were fully repaid. As the plaintiff terminated its lease of the building after nine years, the anticipated income from lease rentals did not happen and D1 found it difficult to service its loan repayments to the plaintiff such that D1's four associated companies ('the associated companies') had to assist by making substantial advances to D1. The associated companies filed related suits against the plaintiff for losses incurred as a result of their having to make advances to D1. Those suits were heard together with the instant main suit. In their counterclaim, the defendants, inter alia, sought a declaration that the plaintiff was estopped from asserting any rights under the credit facilities against D1 and that D1's acceptance to restructure the facilities, because of its difficulty in repayment, was procured through economic duress. The defendants also claimed for depreciation in the value of the land acquired for the second building on account of the building not being built. The four oral

representations the defendants alleged the plaintiff had breached were: (i) the plaintiff would remain a tenant of D1 at Wisma CY until all credit facilities repayable by D1 were settled ('the lease duration representation'); (ii) the plaintiff would pay for the increase in utilities, assessments, quit rent and sewerage charges ('the outgoings representation') (iii) the plaintiff would not take action against the associated companies in respect of facilities granted to them pending restructuring of those facilities ('the restructuring representation') and (iv) the plaintiff would lease the second building and the lease rental would be used to off-set repayment of facilities granted to acquire the land on which the building was built ('the second building representation'). The plaintiff contended that, unlike in the case of Wisma CY, it had only agreed to fund the acquisition of the land for the second building; that the building itself was the defendants' own project and there was no agreement for the plaintiff to lease the building.

Held, allowing the claim and dismissing the counterclaim and the claims of D1's associated companies:

(1) The sub lease granted by D1 to the plaintiff was for a term of ten years with an option to renew. Not only was there no contractual obligation on the plaintiff's part to occupy the premises for a fixed duration of 40 years, but even for the first ten year sublease the plaintiff had the right to terminate it at any time by giving notice (see para 28).

(2) The plaintiff was within its rights when it opted to terminate the sub-lease and it was not in breach. It did not help the defendants if they chose to interpret a ten year lease with options to renew for another three terms of ten year lease to be a 40 year lease with no break or exit clause (see paras 63 & 65).

(3) Nowhere in any of the letters between the parties was it expressed that there was a binding collateral contract or an agreement/understanding that the plaintiff would stay in Wisma CY for 40 years or at least until D1 had fully repaid the facilities (see para 116).

(4) Evidence of the lease duration representation was rejected because the same was not capable of coming within any exception to s 92 of the Evidence Act 1950 and, in fact, had the capacity to contradict, vary, add to or subtract from the terms of the agreement to lease, the sublease and the other facility documents that confirmed the duration of the sublease (see para 89).

(5) The proposed second building was a project for D1's own development and not a second building for the plaintiff. Based on the terms and conditions of the letters of offer, D1 was under a clear obligation to repay the facilities whether or not the second building was constructed (see para 214).

(6) Having accepted and declared that the plaintiff would not be liable for further payments in respect of outgoings, the defendants' claim for increased outgoings could not be maintained as there had been accord and satisfaction with respect to the claim. The defendants were also estopped from making such a claim (see para 130).

(7) No restructuring representation had been made that had been breached by the plaintiff. The restructured loans with D1, D2 and the associated companies were on terms mutually agreed upon and the defence of economic duress did not avail the defendants and the associated companies (see para 177).

[Bahasa Malaysia summary

Plaintif mengambil tindakan terhadap defendan pertama ('D1') sebagai peminjam, defendan kedua ('D2') sebagai penjamin korporat dan defendan ketiga dan keempat sebagai penjamin-penjamin peribadi untuk mendapatkan kembali jumlah wang yang terhutang bagi kemudahan kredit yang diberikan kepada D1. Defendan-defendan menghujahkan bahawa D1 tidak bertanggungan kerana plaintif telah melanggar kontrak kolateral dan representasi-representasi lisan tertentu yang telah ia buat berhubung dengan pemberian kemudahan. Defendan-defendan menghujahkan bahawa terdapat perjanjian lisan kolateral bahawa D1 hendaklah menggunakan kemudahan yang diberikan untuk (i) memperoleh tanah, membina dan melengkapkan sebuah bangunan 12 tingkat ('Wisma CY') bagi plaintif untuk pajakan selama 40 tahun dan (ii) mengambil alih sebidang tanah bersebelahan dengan Wisma CY untuk pembinaan sebuah bangunan 18 tingkat, juga untuk digunakan oleh plaintif ('bangunan kedua'). Sewa plaintif yang akan dibayar untuk menduduki Wisma CY adalah ditolak daripada pembayaran balik pinjaman di bawah kemudahan kredit. Defendan mendakwa plaintif melanggar beberapa representasi lisan yang telah dibuat, antaranya adalah bahawa ia akan memajak Wisma CY selama 40 tahun atau sekurang-kurangnya sehingga kemudahan kredit yang telah dibayar sepenuhnya. Apabila plaintif menamatkan pajakan di bangunan tersebut selepas sembilan tahun, dengan pendapatan yang dijangkakan daripada sewa pajakan tidak berlaku dan D1 mendapati adalah sukar untuk membuat pembayaran balik pinjaman kepada kerana empat syarikat bersekutu D1, ('syarikat-syarikat bersekutu') perlu membantu membuat pendahuluan *substantial* kepada D1. Syarikat-syarikat bersekutu memfailkan saman terhadap plaintif bagi kerugian yang ditanggung akibat daripada pendahuluan yang terpaksa mereka buat kepada D1. Tindakan-tindakan tersebut didengar bersama-sama dengan saman ini. Dalam tuntutan balas mereka, defendan, antara lain, memohon satu deklarasi bahawa plaintif telah diestop daripada membangkitkan apa-apa hak di bawah kemudahan kredit terhadap D1 dan penerimaan D1 untuk menyusun semula kemudahan, kerana kesukarannya dalam pembayaran balik, diperolehi melalui paksaan ekonomi. Defendan juga mendakwa bagi susut nilai dalam nilai tanah

yang diambil alih untuk bangunan kedua disebabkan bangunan tersebut tidak dibina. Empat representasi lisan yang defendan dakwa plaintif telah langgari adalah: (i) plaintif akan kekal sebagai penyewa D1 di Wisma CY sehingga semua kemudahan kredit yang perlu dibayar oleh D1 telah diselesaikan ('perwakilan tempoh pajakan'); (ii) plaintif akan membayar peningkatan dalam utiliti, penilaian, cukai tanah dan caj pembetungan ('perwakilan pasti'); (iii) plaintif tidak akan mengambil tindakan terhadap syarikat-syarikat bersekutu bagi kemudahan yang diberikan sementara penyusunan semula kemudahan-kemudahan tersebut ('perwakilan penstrukturan semula ') dan (iv) plaintif akan memajakkan bangunan kedua dan sewa pajakan akan digunakan untuk pembayaran balik kemudahan yang diberikan untuk memperoleh tanah atas mana bangunan tersebut dibina ('perwakilan bangunan kedua'). Plaintif menghujahkan bahawa, tidak seperti dalam kes Wisma CY, ia hanya bersetuju untuk membiayai pengambilalihan tanah untuk bangunan kedua; bahawa bangunan tersebut sendiri adalah projek defendan sendiri dan tiada perjanjian bagi plaintif untuk memajak bangunan.

Diputuskan, membenarkan tuntutan dan menolak tuntutan balas dan tuntutan syarikat-syarikat bersekutu D1:

(1) Pajakan kecil yang diberikan oleh D1 kepada plaintif adalah untuk tempoh sepuluh tahun dengan pilihan untuk memperbaharuinya. Bukan sahaja tiada obligasi kontrak ke atas plaintif untuk menduduki premis bagi tempoh tetap 40 tahun, tetapi dalam sepuluh tahun pertama pajakan kecil juga, plaintif berhak untuk menamatkan ia pada bila-bila masa dengan memberinya notis (lihat perenggan 28).

(2) Plaintif adalah dalam lingkungan haknya apabila ia memilih untuk menamatkan pajakan kecil dan ia tidak melakukan apa-apa pelanggaran. Ianya masih tidak membantu defendan-defendan sekiranya mereka memilih untuk mentafsir sesuatu pajakan sepuluh tahun dengan pilihan untuk memperbaharuinya selama tiga penggal pajakan sepuluh tahun untuk menjadi pajakan 40 tahun dengan fasal rehat atau keluar (lihat perenggan 63 & 65).

(3) Tiada dalam mana-mana surat-surat antara pihak-pihak dinyatakan bahawa terdapat kontrak kolateral mengikat atau perjanjian/persefahaman bahawa plaintif akan tinggal di Wisma CY selama 40 tahun atau sekurang-kurangnya sehingga D1 telah membayar kemudahan tersebut sepenuhnya (lihat perenggan 116).

(4) Keterangan perwakilan tempoh pajakan ditolak kerana ia tidak wujud dalam mana-mana pengecualian kepada s 92 Akta Keterangan 1950 dan, sebenarnya, mempunyai kapasiti untuk menyangkal, mengubah, menambah atau mengurangkan daripada terma-terma perjanjian pajakan, pajakan kecil dan dokumen-dokumen kemudahan lain yang mengesahkan tempoh pajakan kecil (lihat perenggan 89).

(5) Bangunan kedua yang dicadangkan adalah satu projek untuk pembangunan sendiri D1 dan bukan sebuah bangunan kedua bagi plaintif. Berdasarkan terma-terma dan syarat-syarat surat tawaran, D1 adalah jelas bertanggungan yang jelas untuk membayar balik kemudahan-kemudahan tersebut sama ada bangunan kedua dibina atau tidak (lihat perenggan 214).

(6) Setelah menerima dan mengisytiharkan bahawa plaintif tidak akan bertanggungjawab bagi pembayaran lanjut bagi *outgoings*, tuntutan defendan bagi bayaran outgoings yang meningkat tidak dapat dikekalkan kerana terdapat kehendaknya dan kepuasan dalam tuntutan tersebut. Defendan juga diestop daripada membuat tuntutan sedemikian (lihat perenggan 130).

(7) Tiada penstrukturan semula perwakilan yang dibuat yang telah dilanggar oleh plaintif. Pinjaman yang disusun semula dengan D1, D2 dan syarikat-syarikat bersekutu adalah atas terma yang dipersetujui bersama dan paksaan ekonomi tersebut tidak dapat menolong defendan dan syarikat-syarikat bersekutu (lihat perenggan 177).]

Notes

For cases on terms of written agreement contradicted, see 7(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 2291–2293.

Cases referred to

Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal [1995] 2 MLJ 770, CA (refd)

Ambank (M) Bhd v Abdul Aziz bin Hassan & Ors [2010] 3 MLJ 784; [2010] 7 CLJ 663, CA (folld)

Ang Sin Hock v Khoo Eng Lim [2010] 3 SLR 179; [2010] SGCA 17, CA (refd)

Beckett v Cohen [1973] 1 All ER 120, QBD (refd)

Berjaya Times Square Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd [2010] 1 MLJ 597, FC (refd)

British Airways Board v Taylor [1976] 1 All ER 65, HL (refd)

British Russian Gazette and Trade Outlook Ltd v Associated Newspapers Ltd [1933] 2 KB 616, CA (refd)

Browne v Dunn (1893) 6 R 67, HL (refd)

CM Naested v The State of Perak [1925] 5 FMSLR 185, CA (refd)

Chin Nam Bee Development Sdn Bhd v Tai Kim Choo & 4 Ors [1988] 2 MLJ 117; [1988] 1 CLJ 457 (refd)

China Insurance Co (Singapore) Pte Ltd v Liberty Insurance Pte Ltd (formerly known as Liberty Citystate Insurance Pte Ltd) [2005] 2 SLR 509, HC (refd)

Datuk Tan Leng Teck v Sarjana Sdn Bhd & Ors [1997] 4 MLJ 329, HC (refd)

Derry v Peek (1889) 14 App Cas 337, HL (refd)

EC Investment Holding Pte Ltd v Ridout Residence Pte Ltd & Anor (Orion Oil Ltd and another, interveners) [2011] 2 SLR 232, HC (refd)

Eushun Properties Sdn Bhd & Ors v MBf Finance Bhd [1992] 2 MLJ 137, SC (refd)
Fifield v W& R Jack Ltd [2000] 3 NZLR 129, PC (refd)
Friary, Holroyd and Healey's Breweries Ltd v Singleton [1899] 2 Ch 261; (1899) 81 LT 101, CA (refd)
Gan Kui Lan v Chia Kor Loong (No 1) [2002] MLJU 352; [2002] 7 CLJ 141, HC (refd)
Gek Lau Choon Theatrical Company v Hu Kiang Yan [1937] MLJ 25 (refd)
Goi Ching Ang v PP [1999] 1 MLJ 507, FC (refd)
Greenwood v Martin's Bank Ltd [1932] 1 KB 371, CA (refd)
Guan Teik Sdn Bhd v Haji Mohd Noor bin Haji Yakob & Ors [2000] 4 MLJ 433, CA (refd)
Heilbut, Symons & Co v Buckleton [1913] AC 30, HL (refd)
Hong Leong Bank Bhd v Asakura Industry Sdn Bhd & Ors [2011] 9 MLJ 723, HC (refd)
Industrial & Agricultural Distribution Sdn Bhd v Golden Sands Construction Sdn Bhd [1993] 3 MLJ 433, HC (refd)
Jamin Trading Sdn Bhd & Anor v Shell Malaysia Trading Sdn Bhd [2011] 4 MLJ 662, HC (refd)
Kim Guan & Co Sdn Bhd v Yong Nyee Fan & Sons Sdn Bhd [1983] 2 MLJ 8, PC (refd)
Koh Siak Poo v Perkayuan OKS Sdn Bhd & Ors [1989] 3 MLJ 164, SC (refd)
Latham v Credit Suisse First Boston [2000] 2 SLR 693, CA (refd)
Lemon Grass Pte Ltd v Peranakan Place Complex Pte Ltd [2002] 4 SLR 439, HC (refd)
Lim Yew Seng v Hummel International Sports & Leisure A/S [1996] 3 MLJ 7, CA (refd)
Ling Hock Ling v Tai Lian Development Co [2006] 6 MLJ 712, CA (refd)
Menah Sulong v Lim Soo & Anor [1983] 1 CLJ 26, FC (refd)
Mulpha Pacific Sdn Bhd v Paramount Corp Bhd [2003] 4 MLJ 357, CA (refd)
National Coal Board v WM Neill & Son (St Helen) Ltd [1984] 1 All ER 555 (refd)
Ng Chooi Kor v Isyoda (M) Sdn Bhd [2010] 3 MLJ 492, CA (refd)
Ng Lay Choo Marion v Lok Lai Oi [1995] 3 SLR 221, CA (refd)
Pao On & Ors v Lau Yiu Long & Ors [1980] AC 614, PC (refd)
Public Textiles Berhad v Lembaga Letrik Negara [1976] 2 MLJ 58, FC (refd)
R v Sunair Holidays Ltd [1973] 2 All ER 1233, CA (refd)
RHB Bank Bhd (substituting Kwong Yik Bank Bhd) v Kwan Chew Holdings Sdn Bhd [2010] 2 MLJ 188, FC (refd)
Raju Jayaraman Kerpaya v Chung Khiaw Bank Ltd [1997] 2 MLJ 590, CA (refd)
Rira Bina Sdn Bhd v GBC Construction Sdn Bhd [2011] 2 MLJ 378, HC (distd)
Royal Selangor Golf Club v Anglo-Oriental (Malaysia) Sdn Bhd [1990] 2 MLJ 163; [1990] 3 CLJ (Rep) 37, HC (refd)
S Chellatamby v CA Velupillay [1933] MLJ 222 (refd)

Samaworld Asia Sdn Bhd & Anor v RHB Bank Bhd [2008] 6 CLJ 44, CA (refd)
Setapak Heights Development Sdn Bhd v Tekno Kota Sdn Bhd [2006] 3 MLJ 131; [2006] 3 AMR 410, CA (refd)
Seven Seas Industries Sdn Bhd v Philips Electronic Supplies (M) Sdn Bhd & Anor [2008] 5 MLJ 157, CA (refd)
Solid Kitchen Sdn Bhd v Aman Teguh-WICC JV Sdn Bhd & Anor [2003] 5 MLJ 412; [2003] 1 LNS 54, HC (refd)
Soon Peng Yam & Anor v Bank of Tokyo-Mitsubishi (Malaysia) Bhd [2004] 2 MLJ 31, CA (refd)
Takako Sakao (f) v Ng Pek Yuen (f) & Anor [2009] 6 MLJ 751, FC (refd)
Tan Chong and Sons Motor Company Ltd v Yang Chin Lang [1967] 1 MLJ 123 (refd)
Tenaga Nasional v Teobros Development Sdn Bhd [2008] 6 MLJ 391; [2008] 1 LNS 395, CA (refd)
Tindok Besar Estate Sdn Bhd v Tinjar Co [1979] 2 MLJ 229, FC (refd)
UDA Holdings Bhd (formerly known as Perbadanan Pembangunan Bandar) v Melewar Leisure Sdn Bhd (formerly known as Harta Bumi Sdn Bhd) [2009] 2 MLJ 408, HC (refd)
Usahatek Sdn Bhd v Asia Insurance (M) Bhd (Palaniappan a/l Sinnapan (trading under the name and style of Insure Training Centre, third party)) [2011] 7 MLJ 1, HC (refd)
Wiedemann v Walpole [1991] 2 QB 534, CA (refd)
Wong Hon Leong David v Noorazman bin Adnan [1995] 3 MLJ 283; [1995] 4 CLJ 155, CA (refd)
Yong Tim v Hoo Kok Chong & Anor [2005] 3 CLJ 229, FC (refd)

Legislation referred to

Evidence Act 1950 ss 73A, 73A(6), 91, 92, 92(b), (c), 94(b), 101, 115
Limitation Act 1953 s 6
Rules of the High Court 1980 O 38 rr 1, 9, O 39 r 1
Statutory Declarations Act 1960

Rabindra Nathan (Sharlini Jeyaratnam and Victoria Chee with him) (Shearn Delamore & Co) for the plaintiff.
Arthur Wang (Wong Chooi Mey, Shareena Shahril and Sharifah Natasha with him) (Arthur Wang Lian & Associates) for the defendants.

Lee Swee Seng JC:

PROLOGUE

[1] On the surface, this is a seemingly simple and straight-forward suit brought by the plaintiff bank to recover the amounts due to it from the borrower and its guarantors of same credit facilities granted to it which facilities were subsequently restructured. However, the defendants contended that there

is more to it than meets the eye. The facilities, it was said, were all in respect of a building that the plaintiff wanted to lease for long-term which was to be constructed and furnished by the first defendant with the facilities extended to it by the plaintiff bank. The building is called Wisma Char Yong ('Wisma CY'). There was also another adjacent piece of land which acquisition was financed by the plaintiff for a building to be constructed thereon with the plaintiff being given a first right of refusal to lease the building when completed.

[2] The defendants contended that it was a right-pocket to left-pocket deal for the plaintiff where the rental it has to pay is deducted at source from the monthly instalments of the first defendant. There was hardly any risk to the defendants and every likelihood of capital appreciation of the properties in years to come. It was a win-win venture for both parties.

[3] The plaintiff had not stayed as a tenant for what the defendants said is the entire 40 years lease and hence for breach of that oral representation and other representations, the plaintiff is not only not entitled to recover the various facilities, but that the first defendant and its associated companies have a claim against the plaintiff bank very much far in excess of the plaintiff's claims.

[4] Apparently the plaintiff's move from Wisma CY around 2001 to Menara Lion (which later was renamed Menara Citibank) was because of a default by a borrower and as part of a settlement with the plaintiff, there was the purchase of the shares of a company belonging to the borrower which later resulted in the plaintiff controlling the company that owns Menara Citibank.

[5] The trial took 23 days and there was also a further one day of taking deposition from a witness for the plaintiff, Mr Wong Siew Chong ('WSC') in Singapore. That was made pursuant to a Malaysian order for examination of a witness outside the jurisdiction dated 4 October 2011 and an order of the Singapore High Court dated 14 November 2011 for the taking of the deposition. The plaintiff called witnesses and the defendants called six witnesses.

[6] If this judgment has been unduly long it was because of the protracted trial stretching over 23 days and the 16 persons called as witnesses.

PARTIES

[7] The plaintiff had granted a few credit facilities to the first defendant ('D1') Pembangunan Cahaya Tulin ('PCT') which facilities were guaranteed by a corporate guarantee from the second defendant ('D2'), Juru Bena Tenaga Sdn Bhd ('JBT') and a personal guarantee and indemnity from the third and fourth defendants ('D3 and D4'), Jim Yew Jin and Jim Yeow Cheng

respectively. As D4 had been adjudicated a bankrupt already by the time of trial, the plaintiff's claim in essentially against D1, D2 and D3 (collectively called the 'defendants') for sums outstanding under the various facilities which consisted of four Term loan facilities and three overdraft facilities.

PROBLEM

[8] The key defence of the defendants was that there was a collateral oral agreement alongside the various facilities for it cannot be denied, and indeed was not denied, that the various facilities extended by the plaintiff was for the acquisition of a piece of land to construct a 12 storey building for the plaintiff to rent and the other facilities were all related to the construction of additional floors for the plaintiff's use, renovation costs and capital expenditure incurred, the acquisition of a further pice of adjacent land for the construction of another building (which the defendants said was for the plaintiff's use) and for assessment charges relating to the building.

[9] The defendants contended that the collateral oral contract was that the plaintiff would occupy the building so constructed for at least 40 years or at least until the credit facilities were fully repaid. Various oral representations were given to the defendants to that effect.

[10] The defendants contended that because of the plaintiff's breach of the collateral contract and the oral representations given, D1 is not under any obligation to repay the sums outstanding under the credit facilities granted. The defendants counterclaimed for, inter alia, loss of rental and for increase in quit rent and assessment as well as severage charges and for general damages to be assessed.

[11] The four associated companies of D1 and D2 had also made various ancillary claims against the plaintiff in four separate suits brought by each one of them ie Pancaran Nilai Sdn Bhd ('Pancaran Nilai'), Kansas Corporation Sdn Bhd ('Kansas'), Ampang Ukay Sdn Bhd ('Ampang Ukay') and Unique Creation Sdn Bhd ('Unique Creation'). These related suits were heard together with the main suit.

[12] The claims of the associated companies are that because of the breach of the plaintiff of its collateral contract and various oral representations, the associated companies cash flow was affected and they had to make various advances to D1 to assist it in servicing the various credit facilities with the result that they themselves suffered related losses. The loans of the associated companies in question were taken from the same plaintiff bank.

[13] These companies were in the building construction and development

business. Pancaran Nilai claimed against the plaintiff, inter alia, a sum of RM33,445,995 being agreed liquidated damages as a result of late delivery to the purchasers.

[14] Kansas Corporation claimed against the plaintiff for, inter alia, sum of RM32,284,581.12 being losses suffered as a result of the sale of properties below market price; a further sum of RM52,407,721.41 being agreed liquidated damages as a result of late delivery to the purchasers; a further sum of RM86,425,142.29 being loss of profit for the development of a project known as Prima Selayang.

[15] With respect to Ampang Ukay, it claimed against the plaintiff, inter alia, for a sum of RM5,789,906.83 being agreed liquidated damages as a result of large delivery to the purchasers. As regards Unique Creation it claimed against the plaintiff, inter alia, a sum of RM61,117,257.57 being agreed liquidated damages as a result of late delivery to the purchasers. There was also a further claim of RM27,216,597.49 being loss of profit for the development of the project known as Bandar Pinggiran Subang.

PRAYERS

[16] The plaintiff's claims against the defendants are summarised, inter alia, as follows:

(a) a sum of RM12,721,673.79 together with interest thereon at the rate of 9%pa calculated from 15 July 2005 until date of full payment thereof;

(b) a sum of RM9,214.090.74 together with interest thereon at the rate of 8%pa calculated from 15 July 2005 until date of full payment thereof; and

(c) costs on a client-and-solicitor and full indemnity basis.

[17] D1 in turn counterclaimed, inter alia, as follows against the plaintiff:

(a) a declaration that at all material times a collateral agreement existed between the plaintiff and D1 side by side with the facility and security agreements and the sublease and/or tenancy agreements for the property at Wisma CY;

(b) a declaration that the plaintiff is estopped from asserting that there was no such collateral agreement and/or that it was not valid in law;

(c) a declaration that the plaintiff is estopped from asserting any rights under the facilities or the restructured facilities as against D1;

(d) a declaration that the plaintiff had procured D1's acceptance to the restructured facilities through economic duress;

(e) the sum of RM3,200,568 being the increase of quit rent and assessment for the period from 1993–1999 and sewerage charges;

(f) loss of diminution in value in respect of the three vacant lots and three shop houses adjacent to Wisma CY amounting to RM3,150,000;

(g) interest on the said sum of RM3,200,568 at the rate of 8%pa from the date of filing the counterclaim to the date of full and final settlement of the same;

(h) interest on the said sum of RM3,150,000 at the rate of 8%pa from the date of filing the counterclaim to the date of full and final settlement of the same;

(i) loss of income to be assessed by the registrar (RM6,351,225 as at 1998) from 14 January 2000–14 January 2032;

(j) interest on the loss of income that has been assessed by the registrar at the rate of 8%pa from the date of an order herein to the date of full and final settlement of the same;

(k) general damages to be assessed;

(l) interest on the general damages at the rate of 8%pa from the date of an order herein to the date of full and final settlement of the same; and

(m) costs.

PAROL AND PAPER EVIDENCE

[18] The oral representations which the defendants said the plaintiff had made to them when the credit facilities were taken may, as suggested by plaintiff's counsel, be conveniently categorised as follows:

(a) that the plaintiff would remain a tenant of D1 at the building known as Wisma CY until all loans and overdrafts payable by D1 were settled ('the lease duration representation');

(b) that the plaintiff would be responsible for payments in respect of increased utilities, assessments, quit rent and sewerage charges ('the outgoings representation');

(c) that the associated companies would be given indulgence vis-a-vis their respective facility repayment obligations for facilities with the plaintiff, in that no action would be taken against the associated companies pending

restructuring of their respective facilities, and that the facilities granted to D1 would be restructured on terms that were mutually agreeable ('the restructuring representation'); and

(d) that the plaintiff would rent a second building to be constructed adjacent to Wisma CY. Further, the repayment of the facilities to acquire the land on which the second building was to be constructed would on the same understanding as the previous facilities granted to construct and develop Wisma CY ('the second building representation').

THE LEASE DURATION REPRESENTATION

[19] I shall first proceed to examine the relevant terms of the lease agreement between the owner of the land and D1 and the agreement to lease as well as the sublease agreement between D1 and the plaintiff.

[20] D1 had earlier, on 7 January 1988, executed a lease agreement with Selangor Char Yong Fui Kwan ('the association') for a lease of the land owned by the association and the building to be erected by D1 thereon for a term of 40 years upon completion of the building commencing on the date of issue of the certificate of fitness for occupation for the building. The land owned by the association was held under Lots 152–154 and 162–165, Section 49, District of Kuala Lumpur.

[21] Subsequently by an agreement to lease dated 18 August 1988 between D1 and the plaintiff, D1 agreed, inter alia, to grant to the plaintiff a sublease of the land:

> By an agreement dated 18 August 1988 between PCT and the Bank (hereinafter called 'the Second Agreement'), PCT agreed, inter alia, to grant to the Bank a sub-lease of the Land and the Building commencing three (3) months after the issue of the Certificate of Fitness to and the handing over of vacant possession of the Land and the Building with the option to extend the term of the sub-lease for a further period of ten (10) years (hereinafter called 'the Sub-Lease').

[22] In essence, it is a sublease agreement with an option given to the plaintiff to renew the sublease.

[23] The definition of 'The Sub-Lease' in the agreement to lease in article I, s 1.01(h) reads:

> 'The Sub-Lease' means the *Sub-Lease of ten (10) years* to be granted by the Company to the Bank pursuant to the terms of this Agreement in the form of the Annexure to the Sub-Lease set out in Appendix D herein; (Emphasis added.)

[24] Article II, s 2.03 under the heading of 'THE SUB-LEASE' provides:

> On completion of the Building, the Company is desirous of granting to the Bank a Sub-Lease of the Said Premises for a term of *TEN (10) YEARS* and the Bank is desirous of taking up the Sub-Lease subject to the terms and conditions herein contained. (Emphasis added.)

[25] Article III, s 3.01 of the agreement to lease under the heading of 'SUB-LEASE' reads as follows:

> In consideration of the mutual covenants herein, the Company hereby agrees to grant and the Bank hereby agrees to take a Sub-Lease of the Said Premises for a term of *TEN (10) YEARS* such term to commence three (3) months after the issuance of the Certificate of Fitness to and the handing over of vacant possession of the Said Premises to the Bank such Sub-Lease to be in accordance with the form of Sub Lease annexed herewith as Appendix D. The Sub-Lease shall be signed by both parties within thirty (30) days of the issuance of the Certificate of Fitness. (Emphasis added.)

[26] Appendix D of the sublease agreement under s 3.01 provides as follows:

> The Lessor agrees to let and the Lessee agrees to take the Demised Premises subject to the terms and conditions hereinafter contained for a term of *TEN (10) YEARS* commencing from … (Emphasis added.)

[27] Appendix D, s 9.10 of the sub-lease agreement under 'OPTION TO RENEW' stipulates as follows:

> The Lesses shall have the right, by serving a notice in writing on the Lessor at least three (3) months prior to the expiry of the existing term, to renew the Sub-Lease for a further term or terms aggregating THRITY (30) YEARS upon the same terms and conditions as are contained herein (including this provision for renewal until the renewals make up a total of thirty (30) years) at the following net rental (the expression 'net rental' is defined as the rental exclusive of Service Charges):
>
> 11th to 20th year (2nd … Fifteen (15%) per cent over the net rental of the present term Term)
>
> 21st to 30th year (3rd … Fifteen (15%) per cent over the net rental of the 2nd term Term)
>
> The Service Charges portion of the rental shall be revised at the commencement of each of the Terms in accordance with the market rates prevailing then for the provision of similar services to comparable buildings in Kuala Lumpur. In the event of the disagreement between the parties as to the fair market rate, the average of two (2) valuations by two (2) reputable valuers acceptable to both parties shall be final and conclusive. The costs of the valuations shall be borne equally by both parties.

[28] Not only are there repeated references to the sublease being for ten years to emphasise and underscore the tenure of ten years, there is also the 'EARLY TERMINATION' clause in s 9.11 of Appendix D. This puts beyond a pale of doubt that not only was there no contractual obligation to occupy the premises for a fixed duration of 40 years, but that even for the first ten year sublease, there was a break or exit or early termination of the sublease for it reads:

> SECTION 9.11 EARLY TERMINATION
>
> Notwithstanding anything herein contained, the Lessee shall have the right to terminate this Sub-Lease at any time prior to maturity by serving on the Lessor written notice of such intention but subject always to the following conditions:
>
> (a) in the event that the Lessee's Jalan Ampang Branch is prohibited by the Appropriate Authority or it becomes unlawful for the Lessee to carry on its business as bankers within the Federal Territory during the term of the Sub-Lease, TWELVE (12) MONTHS notice shall be given by the Lessee and the Lessor shall not be entitled to any claims or damages for the early termination of the Sub- Lease;
>
> (b) in all other instances, SIX (6) MONTH'S notice shall be required but the Lessee shall be liable to pay the Lessor agreed liquidated damages at the following rates:
>
> (i) if the Sub-Lease is terminated within the first five (5) years, the agreed liquidated damages shall be equivalent to twelve (12) months rent;
>
> (ii) if the Sub-Lease is terminated subsequently, the agreed liquidated damages shall be equivalent to six (6) months rent.

[29] At the risk of stating that which is only too obvious, let me say here that our words are the product of our thoughts and when articulated and expressed in writing, they represent what has gone through our minds, denoting our thoughts and intentions. No one can read the above 'EARLY TERMINATION' clause and say that those words mean nothing and so should be ignored as having no effect where the rights of the parties are concerned.

[30] I shall proceed to examine the relevant facility agreements between the plaintiff and D1.

[31] There was the first term loan of RM12.7m where under the facility agreement dated 13 March 1990 it was set out in article I, recitals as follows:

Section 1.02 The First Agreement

By an agreement dated 7 January 1988 between Selangor Char Yong Fuir Kuan (hereinafter called 'SCYFK') and PCT (hereinafter called 'the First Agreement'), SCYFK agreed, inter alia, to grant to PCT a lease of the Land and the Building for a term of forty (40) years upon the completion of the Building commencing on the date of issue of the Certificate of Fitness for Occupation for the Building.

[32] As for the third term loan of RM11,300,000 under the facility agreement dated 23 April, 1991, there was also set out in the recital section 1.04 the second agreement as follows:

By an agreement dated 18 August 1988 between PCT and the Bank (hereinafter called 'the Second Agreement'), PCT agreed, inter alia, to grant to the Bank a sub-lease of the Land and the Building for a term of *ten (10) years* upon completion of the Building commencing three (3) months after the issue of the Certificate of Fitness to and the handing over of vacant possession of the Land and the Building with *the option to extend the term of the sub-lease for a further period of ten (10) years* (hereinafter called 'the Sub-Lease'). (Emphasis added.)

[33] Then there was a fourth term loan for RM3,600,000 by a loan agreement dated 15 December 1995 which recital 1.02 provides as:

Section 1.02 The Sub-Lease

By an agreement in writing dated 18th day of August 1988 entered into and made between the Bank and the Borrower, the Borrower agreed, inter alia, to grant to the Bank a sub-lease of the Land (hereinafter referred to as 'the Sub-Lease') for term of *ten (10) years* after the issuance of the Certificate of Fitness for Occupation to the Building and the delivery of vacant possession thereof to the Bank, with an option extend to the term of the Sub-Lease for a *further period of ten (10) years.* (Emphasis added.)

[34] For ease of payment of the instalments to the facility agreements for the various term loans, there was entered into a deed of assignment of rental proceeds dated 15 December 1995 that spelt out in the recital 2 as follows:

By an agreement in writing dated 18th day of August 1988, entered into and made, between the Assignee and the Assignor, the Assignor agreed, inter alia, to grant to the Assignee a sub-lease of the Land (hereinafter referred to as 'the Sub-Lease') for a term of *ten (10) years* after the issuance of the Certificate of Fitness for Occupation to the Building, as hereinafter defined, and the delivery of vacant possession thereof to the Assignees, with *an option to extend the term of the Sub-Lease to further period of ten (10) years.* (Emphasis added.)

[35] On top of that there is the contemporaneous correspondence dated

29 April 1988 from the plaintiff to Bank Negara Malaysia marked as exh P4 wherein the plaintiff had referred to a ten year duration of the sublease in question.

[36] Against the written terms of the various agreements stipulating and spelling out the period of the sublease to be for ten years, there are the oral representations contended by the defendants. The oral representation are said to have been made during the 1987–1988 period of negotiation for the lease, sublease and the credit facilities. The oral representations as alleged by the various witnesses for the defendants can be summarised as follows:

(a) that a 12-storey office would be constructed on Lots 152–154 and 162–165, Section 49, District of Kuala Lumpur;

(b) that the building would be purpose-built for the plaintiff;

(c) that D1 would receive funding for the construction of the building;

(d) that the plaintiff would occupy the building and pay rent to D1;

(e) that the rent payable to D1 would be set-off against the loan instalments due to the plaintiff;

(f) that the plaintiff would occupy the building until all facilities were repaid in full; and

(g) that the plaintiff would pay all additional charges for utilities for the building.

[37] The defendants alleged that the lease duration representation was made by officers of the plaintiff namely PW7, DW1, DW2 and DW3 during discussions and negotiations held between the plaintiff and representations of D1. I shall now analyse their parol evidence in court.

[38] PW7 is Mr Lim Tuang Ooi. He only commenced employment with the plaintiff in April 1989. His first meeting with D3 was sometime in late 1991 or early 1992 in his capacity as financial controller. PW7 confirmed that he was not involved in the discussions and negotiations held during the 1987–1988 period. It is only obvious then that he could not be a party to the lease duration representation. Under cross-examination he was confidently certain and confirmed that he did not and could not have made any such representation during the negotiations stage.

[39] DW1 is Dato' Ahmad Zaki bin Abdul Razak. He was a former employee of the plaintiff. He was the head of operations from 1987–2001. He testified that the plaintiff was confident that it would stay in Wisma CY on a long-term basis. Whilst that may be the long-term plan of the plaintiff at that time, nothing in life or for that matter in banking business is certain. DW1

however conceded under cross-examination that under the sublease agreement the plaintiff had the exclusive right to renew or terminate the lease. DW1 further acknowledged the fact that the sublease agreement was structured such that the plaintiff had the maximum flexibility in terms of occupying Wisma CY in that it could stay for less than ten years or up to a maximum of 40 years subject to the new rates of rental stipulated therein.

[40] DW2 is Mr Choe Chee Kong. He was a credit officer of the plaintiff in 1986 and became its credit manager from 1991 until he left the employment of the plaintiff. He maintained that the plaintiff's intention was to stay in Wisma CY on a long-term basis and that the rental payable by the plaintiff to D1 would be used to set-off the instalments due to the credit facilities until full repayment of the loan.

[41] However under cross-examination he conceded that the sublease agreement was structured so that the plaintiff could leave if it wanted to and that the plaintiff was under no legal obligation to occupy Wisma CY until D1 had repaid the loan, and that it was 'free to go' if it wanted to.

[42] DW3 is Mr Choo Nai Kwong. He joined the plaintiff in 1989 as a loan-syndication manager and left the plaintiff in March 1995. As he had joined the plaintiff only in 1989, he admitted he was not privy to any of the meetings leading up to the sublease agreement and hence, no personal knowledge of the matter.

[43] Under cross-examination DW3 admitted that the plaintiff had an unrestricted right to vacate Wisma CY and was not obliged to stay for 15 years, which was the tenure of the loans. He also agreed that the loan documentation was drawn up in such a way as to give the plaintiff the right to insist that D1 would have to repay the loan even if the plaintiff chose not to stay for the full 15 years. Finally he conceded that even if the plaintiff were to relocate, D1 would still be liable for repayments under the credit facilities.

[44] DW5 is Mr Boon Che Meen. He was the project manager of D1 from 1989 to 2005. He is currently the general manager of D2. He agreed that since he only joined D1 in 1989, he was not involved in any of the discussions leading up to the singing of the agreement to lease on 18 August 1988.

[45] DW6 is D3 in these proceedings. He is the managing director of D2 and a director of D1 and the associated companies. He has some 30 years of experience in the construction business. He testified that there was an understanding between the association, D1, Tan Sri Liew Kee Sin, the plaintiff and him that the plaintiff would rent Wisma CY for 40 years. However, the defendants did not call anyone from the association, or Tan Sri Liew Kee Sin to

corroborate whether indeed that was the understanding arrived at. According to DW6, it was initially agreed between DW6 and the plaintiff that the term of the sublease would be for 40 years, or 20 years with an option to renew for a further term of 20 years. He said the term of the sublease was changed to ten years in order for the plaintiff to get approval from the headquarters in Singapore. He continued to narrate that the Ds objected to the change but the plaintiff assured them that it would rent Wisma CY for a further term of ten years. If that were true, then at least one would have expected the defendants to have written to the plaintiff to confirm that the terms would be as bargained and not as written in the sublease agreements.

[46] However under cross-examination, DW6 agreed that the plaintiff had the sole option to renew after ten years and that no one had forced him to sign the sublease agreement between plaintiff and D1. As I can observed, DW6 as D3, is no naive businessman, new to the business of negotiating with banks. The contrary is true; an experienced and erudite businessman, most familiar with the exposure to risk of any business venture and the eventualities and exigencies of an enterprise. He himself is a controlling shareholder and director of a few development and construction companies of which the associated companies are but a few. He is not unfamiliar with the cycle of boom and bust like all industries related to the property market. He would not be easily cowed let alone conned into executing an agreement that does not reflect the terms as negotiated.

[47] It must be pointed out that this story of having to confine the terms of the sublease to just ten years so as to hasten approval from the headquarters in Singapore is not stated at all in the defence of the defendants. Indeed this story surfaced for the first time at the trial and being something so material, it ought to be rejected as an afterthought. DW6 as D3 is a seasoned developer and not a simpleton. He has been involved in a number of development projects of which the ones undertaken by the associated companies are but a few. He would have strategised by at least writing to the plaintiff and had it confirmed in writing that the sublease was for 40 years. Nothing of that sort found its way into any correspondence or minutes of meetings held.

THE FORMALITY AND FINALITY OF THE AGREEMENT

[48] Courts have consistently held that the more formal a document is, the slower the court would be to allow oral evidence to be admitted to vary and here, to contradict, clear terms of a contract reduced into writing after rounds of negotiations; whether under the guise and devise of a collateral term or an oral misrepresentation. Indeed, the courts have every reason to be suspicious of any attempt to canvass a collateral contract to contradict the clear terms of a written concluded contract.

[49] Thus in the Court of Appeal case in *Samaworld Asia Sdn Bhd & Anor v RHB Bank Bhd* [2008] 6 CLJ 44 it was said that the law views with suspicion collateral contracts, the sole effect of which is to vary or add to the terms of the principal contract. It was further stated that collateral contracts must be proved strictly, as well as the terms of such contracts and the existence of a contrary intention on the part of all parties.

[50] It was held in *Gek Lau Choon Theatrical Company v Hu Kiang Yan* [1937] MLJ 25 that when a separate collateral agreement not inconsistent with a written agreement is alleged, the law views with suspicion such collateral contracts, the sole effect of which is to vary or add to the terms of the principal contract.

[51] The *Theatrical Company* case followed the decision in *Heilbut, Symons & Co v Buckleton* [1913] AC 30 where it was clearly expressed that if the terms of a collateral contract that seeks to vary or add to the terms of a principal contract is sought to be proved, the court must have regard not only to the terms of such contracts but the existence of an animus contrahendi on the part of all parties.

[52] Additionally, it is also stated in the *Theatrical Company*'s case that conversations leading up to the making of a contract are not presumed themselves to form a collateral contract. McElwaine, CJ observed that in the *Theatrical Company*'s case that:

> … the more formal the written document is, the more suspicious the court must be as to the existence of a collateral contract, and if the contract is informal less suspicion attaches to the attempt to set up a collateral contract.

[53] The *Theatrical Company*'s case was cited in the *Samaworld*'s case and additionally, the Court of Appeal in the latter decision went on to state that the court must be circumspect and view with suspicion the defendant's attempt to set up the oral collateral contract, contrary to the formal loan documents that were executed with the bank.

SECTIONS 91 AND 92 OF THE EVIDENCE ACT 1950

[54] There is also the statutory hurdle to overcome in ss 91 and 92 of the Evidence Act 1950 before an oral term may be admitted to contracjict, vary, add to or subtract from in this present case the written agreement to lease, the sublease agreement and the various facilities documents all of which confirm the duration of the sublease as being for only ten years.

[55] The High Court in *Usahatek Sdn Bhd v Asia Insurance (M) Bhd*

(Palaniappan a/l Sinnapan (trading under the name and style of Insure Training Centre, third party) [2011] 7 MLJ 1 held that the plaintiff by seeking to adduce evidence of an alleged verbal conversation to prove a written document (in this case an insurance policy) had fallen foul of the rule against parol evidence and s 92 of the Evidence Act 1950.

[56] The learned Judicial Commissioner Hanipah Farikullah JC in delivering her decision referred to the *Samaworld*'s case and the *Theatrical Company*'s case and concluded based on the foregoing authorities any illegal verbal conversation purportedly forming a collateral contract is not binding on the party such against whom the enforcement of the said collateral contract is intended.

[57] The decisions in *Ng Lay Choo Marion v Lok Lai Oi* [1995] 3 SLR 221 and *S Chellatamby v CA Velupillay* [1933] MLJ 222 are further authorities to support the proposition that where documents are highly formal, all salient terms should be contained therein.

[58] The burden of proving the existence of an oral collateral contract lies on the party alleging the same: *Industrial & Agricultural Distribution Sdn Bhd v Golden Sands Construction Sdn Bhd* [1993] 3 MLJ 433 at p 442, His Lordship Visu Sinnadurai J cautioned and clearly stated as follows:

> I do not intend to give a full discourse on the principles governing collateral contracts, except to say that a cautious approach is adopted by the courts in recognising the existence of a collateral contract, especially in cases where it contradicts the terms of a written contract. The objective, however, of using the device of the collateral contract is usually to enforce a promise made prior to the making of the main contract, and but for which the main contract would not have been made. It is an established principle of law that the burden of proving the existence of a collateral contract is on the party alleging its existence. In *Gillespie Brothers & Co v Cheney, Eggar & Co*, Lord Russell of Killowen CJ said (at p 62): '… when the parties arrive at a definite written contract the …presumption is … that (the writing was) intended to contain all the terms of their (contract; but) it is a presumption only, and … either of the parties may allege … an antecedent express stipulation... intended to continue in force with the … written (contract) …' and may contend that the written contract was not intended to include all the terms.

[59] Section 92 of the Evidence Act 1950 provides that when the terms of any contract have been proved according to s 91 of the Evidence Act 1950, no evidence of any oral agreement shall be admitted as between the parties to any such instruments where the said oral agreement contradicts, varies or subtracts from the terms of the contract.

[60] The relationship between ss 91 and 92 of the Evidence Act 1950 is set

out in the decision of *Datuk Tan Leng Teck v Sarjana Sdn Bhd & Ors* [1997] 4 MLJ 329 where His Lordship Augustine Paul JC (as he then was) stated that:

> Section 92 applies to cases where the terms of contracts, grants or other dispositions of property have been proved by the production of the relevant documents themselves under s 91. In other words, it is after the document has been produced to prove its terms under s 91 that the provisions of s 92 come into operation to exclude evidence of any oral agreement or statement, for the purpose of contradicting, varying, adding to or subtracting from its terms. Sections 91 and 92, in effect, supplement each other. Section 91, would be frustrated without the aid of s 92 and s 92 would be inoperative without the aid of s 91. Since s 92 excludes the admission of oral evidence for the purpose of contradicting, varying, adding to or subtracting from the terms of the document properly proved under s 91 it may be said that it makes the proof of the document conclusive of its contents.

[61] I agree with learned counsel for the plaintiff Mr Rabindra Nathan that the agreements relating to the lease of premises at Wisma CY and the various financial facilities granted by the plaintiff to D1 that are relevant in the proceedings herein are highly formal agreements. Given the high degree of formality of the said agreements, the parties would have incorporated into the same all formal terms governing the obligations and relationship of the said parties. Thus if there was an intention to stay at Wisma CY beyond the period of ten years, the same would have been incorporated into the agreement to lease, the sublease and also reflected in the security documents pertaining to the financial facilities. It would be quite incongruous to suggest that for such an important term of a 40 year lease with no break or exit clause, the parties would have agreed and prefer it to be in oral form and not incorporated into the various agreements.

[62] The Witnesses for the defendants admitted under cross-examination, though reluctantly, that the provisions of the sublease allowed the plaintiff to terminate the sublease even before the first ten year is up.

[63] Hence, there can be no doubt that the plaintiff was within its rights when it opted to terminate the sublease and as such, I agree with the plaintiff that no breach can be said to have been committed by the plaintiff according to the terms of the sublease.

[64] The defendants might have preferred it to be different and that the plaintiff should have stayed for the next three extensions of ten year each. While that would work best for the defendants, that was a risk which they would have assessed and accepted as having the appetite for it before inking the various agreements. They are no new-comer to the property market and they cannot be said to not knowing the difference between an option on the part of the plaintiff to renew for the next three terms of ten year each and a contractual

commitment to rent for the next 30 years after the expiry of the first ten year period. Neither are they so naive as being a novice to the nature of a first option to rent where the second building is concerned.

[65] Whilst there is no law in preventing one from being positive and optimistic, one must whilst hoping for the best, be prepared for the worst. A case of if plan A fails, one must have a plan B. It does not help the defendants if they choose to interprete a ten year lease with options to renew for another three terms of ten year lease to be a 40 year lease with no break or exit clause. A formal document cannot be made to say what it does not say. The more formal a document is the more final it is and the more flimsy and frivolous any oral terms or representations would be that are sought to be introduced to frustrate the firm terms of the written contract. Otherwise the floodgates would be opened to sweep away all that has been signed and sealed, with the scary consequences that nothing is final and firm, sure and certain and everything in a state of flux! How then can business be conducted and the sanctity of contracts be preserved? By and large the cases have been consistent in rejecting extrinsic evidence that is contrary to written terms of a contract.

THE REJECTION OF EXTRINSIC EVIDENCE CONTRARY TO WRITTEN TERMS

[66] Across the causeway, the Singapore courts appear to favour a more restrictive and literal approach on the issue of whether oral collateral agreement which is in contradiction with the primary contract may be admitted and accepted. His Lordship Yong Pung How CJ (as he then was), delivering the judgment of the Court of Appeal in *Latham v Credit Suisse First Boston* [2000] 2 SLR 693 at p 701 said:

> For the sake of completeness, we considered whether s 94(b) of the Evidence Act applied to the matter. In our judgment, it could not operate to admit evidence of the verbal agreement either as a collateral contract or as forming part of the terms of a part oral, part written contract. *Section 94(b) only allows the admission of evidence of a collateral contract on matters which are not inconsistent with the written agreement. Where the alleged terms of the oral agreement are in addition to and therefore inconsistent with the written contract, that evidence is inadmissible: Ng Lay Choo Marion v Lok Lai Oi* [1995] 3 SLR 221.

[67] Again in *Lemon Grass Pte Ltd v Peranakan Place Complex Pte Ltd* [2002] 4 SLR 439, the Singapore High Court held at para 128 that:

> Apart from the two rights (cl 1(a) and (b)) expressly reserved to the plaintiffs in the December 1999 lease, all other liberties, rights, easement or advantages are expressly excluded by cl 1. *To that extent, the right claimed by the plaintiffs in the*

A *collateral contract contradict or are in conflict with the terms of the lease. The collateral agreement is thus not admissible in evidence.* (Emphasis added.)

B **[68]** His Lordship Andrew Phang JC (as he then was) in *China Insurance Co (Singapore) Pte Ltd v Liberty Insurance Pte Ltd (formerly known as Liberty Citystate Insurance Pte Ltd)* [2005] 2 SLR 509, wrestled with the concept of collateral contract vis-a-vis the Singapore equivalent of our ss 91 and 92 of our Evidence Act and acknowledged as follows:

C To take but one example, the common law exception relating to collateral contracts allows terms in the collateral contract which are inconsistent with those contained in the main agreement to override terms contained in the main agreement itself. While there are divergences within the English case law itself, the fact remains that cases which embody this principle do exist and are widely cited and applied: see, for example, the oft-cited English High Court decision of *City and Westminster Properties (1934) Ltd v Mudd* [1959] Ch 129 (though compare the Australian position: see JW Carter and DJ Harland, *Contract Law in Australia* (LexisNexis Butterworths, (4th Ed), 2002) at para 613, where reference is made, inter aiia, to the leading Australian High Court decision of *Hoyt's Proprietary Limited v Spencer* (1919) 27 CLR 133). *However, s 94(b) is clearly at variance with the common law rule stated in the preceding paragraph and would therefore appear to prevail over it* (though compare that with s 94(d)). Nevertheless, this proposition does not appear to be clearly established within the local case law: compare, for example, the Malaysian decisions of *Tan Swee Hoe Co Ltd v Ali Hussain Bros* [1980] 2 MLJ 16, especially at p 19, and *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229, especially at p 233. Yet another possible approach was adopted in the (also Malaysian) decision of *Tan Chong & Sons Motor Company (Sdn) Bhd v Alan McKnight* [1983] 1 MLJ 220(especially at p 229). It would appear that the situation is still not settled, *although, in this regard, the Singapore Court of Appeal decision of Latham v Credit Suisse First Boston* [2000] 2 SLR 693 *at p (21) acknowledged the basic controversy and, whilst not expressly stating that the position adopted in Tan Swee Hoe Co Ltd v Ali Hussain Bros, which endorsed the more liberal common law position, was wrong, tended, in the final analysis, to endorse the literal language in s 94(b) to the contrary* (see also the Singapore Court of Appeal decision of *Ng Lay Choo Marion v Lok Lai 0i* [1995] 3 SLR 221 especially at p 226 and per Belinda Ang Saw Ean JC (as she then was) in the Singapore High Court decision of *Lemon Grass Pte Ltd v Peranakan Place Complex Re Ltd* [2002] 4 SLR 439, especially at pp (126)–(131)). (Emphasis added.)

I **[69]** Back home His Lordship Vernon Ong J in *Jamin Trading Sdn Bhd & Anor v Shell Malaysia Trading Sdn Bhd* [2011] 4 MLJ 662 also considered the application of s 92 of the Evidence Act 1950 in the light of evidence of an oral agreement being led in the proceedings before the High Court for the purpose of varying or adding to terms of a written agreement, in this situation, a sale and purchase agreement.

[70] The learned High Court judge, in considering the totality of the evidence before the court, arrived at the conclusion that the separate oral agreement being alleged did not fall within any of the exceptions to s 92 of the Evidence Act 1950 and thus, could not be considered. In arriving at the said position, the learned High Court jugde considered the *Theatrical Company*'s case. In the *Jamin Trading*'s case, Vernon Ong J held that the more formal a written document, the more suspicious the court must be as to the existence of a collateral agreement.

[71] It was held in *Tan Chong and Sons Motor Company Ltd v Yang Chin Lang* [1967] 1 MLJ 123 that the only situation in which evidence of a separate oral agreement can be regarded as admissible is when the same is not inconsistent with or does not contradict the terms of the document, that is silent on the particular matter or matters covered in the separate oral agreement.

[72] I agree with learned counsel for the plaintiff that based on the facts and circumstances of this suit and the four related suits, the separate oral agreement that is sought to be established is one that is incongruous with the contemporaneous documents that are fundamental to the determination of the dispute between the plaintiff and the defendants.

[73] In *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229, Chang Ming Tat FJ held that additional evidence in the form of an oral agreement is only admissible in situations where the provisos to s 92 of the Evidence Act 1950 apply and 'should not be allowed to be introduced' where it would 'be to contradict, vary, add or subtract from the terms of the agreement'. The *Tindok Besar* case was applied in *Seven Seas Industries Sdn Bhd v Philips Electronic Supplies (M) Sdn Bhd & Anor* [2008] 5 MLJ 157 at pp 164–165 where it was held as follows:

> The doctrine of collateral contract or agreement is recognised in this country by virtue of proviso (b) to s 92 of the Evidence Act 1950 which allowed to be admitted in evidence any separate agreement as to any matter on which a documents is *silent and which is not inconsistent with its terms.* Unless the additional evidence sought to be introduced falls within the scope of any of the provisos, it should not be allowed to be introduced as it would be to *contradict, vary, add or subtract from the terms of the agreement* … (Emphasis added.)

[74] I had occasion to apply the above principle in *The Seven Seas*' case in *Rira Bina Sdn Bhd v GBC Construction Sdn Bhd* [2011] 2 MLJ 378. I also referred to the, *Symons*'s case and *Theatrical Company*'s case in considering whether or not to admit evidence of a 'pay when paid' condition that contradicted express terms of the subcontracts relevant in the said proceedings. I noted as follows that the contract was '… not a small building contract' but

'the construction of a major hospital' and that 'the parties had from the outset regulated their relationship in the subcontracts'.

[75] Similarly, the parties to the proceedings herein have, from the start, regulated their relationship vide the agreement to lease, the facility agreement for the first term loan, facility agreement for the second term loan, facility agreement for the third term loan, the sublease, facility agreement for the fourth term loan and deed of assignment of rental proceeds.

[76] The factual matrix of this present suit is not unlike that of the *Rira Bina* case, in that it involves the construction of a commercial building by the D1, financed by the plaintiff and in which space was leased by the plaintiff with rental paid to the D1.

[77] Hence, it is to be expected of the parties and to conclude that the parties in this Suit would have ensured that all terms that governed their relationship would have been reduced into writing.

[78] In the *Rira Bina*'s case I accepted arguments led to demonstrate that the 'pay when paid' condition was an afterthought as it was only raised in afidavits filed during the proceedings and I said as follows at p 395:

> Clearly if the 'pay when paid' condition truly exists, the first available opportunity to rely on the same would have been in the plaintiff's responses to the defendant's demands. However there is not a single letter sent out by the plaintiff which refers to or reflects the 'pay when paid' condition. I agree with the defendant's counsel that this is quite telling! …
>
> I accept the defendant's counsel contention that the 'pay when paid' condition is merely an afterthought raised by the plaintiff to defeat and frustrate the defendant's legitimate and admitted claim.

[79] The plaintiff submitted and with some merits that only in the pleadings in Suit 1016 and the four related suits, and not at any earlier point in time, had the defendants and the related companies raised the purported argument of the representations made by the plaintiff via its officers, to stay for a period beyond the term of ten years ('the initial sublease') (as documented in the agreement to lease, the sublease and a plethora of facility agreements).

[80] If indeed there were representations made by the plaintiff that it would stay at Wisma CY for a period beyond the initial sublease, namely until all facilities are fully repaid then one wonders why it was never asserted before when there were various meetings held on the plaintiff moving out during the initial sublease period and during the restructuring of the various loans of D1 and the related loans of the associated companies. The assertion on the

supposed representation surfaced for the first time in the pleadings of the defendants and the four associated companies after the plaintiff had instituted this suit.

[81] I have every reason to believe that the lease duration representation and the collateral contract arising in connection with the same are an afterthought that the defendants conveniently canvassed to evade their obligations under the various facility agreements.

[82] I was referred to a like finding in *Koh Siak Poo v Perkayuan OKS Sdn Bhd & Ors* [1989] 3 MLJ 164 where the court there found the defence to be an afterthought. It was stated in that case that where the written contracts are clear and unambiguous, the court should not go behind the written terms to introduce or add new terms to it.

[83] Learned counsel for the defendants Mr Arthur Wang cited the case of *Eushun Properties Sdn Bhd & Ors v MBf Finance Bhd* [1992] 2 MLJ 137 where the Supreme Court held at pp 141–142 that:

> We also agree with the learned judge that the two letters do not say clearly that the money disbursed were to be used to pay interest on the loan. But considering the amount and the dates of the drawdown on a quarterly basis shown in the two letters coincided with interest as due and payable under the loan militates against the granting of an O 14 judgment, it is our view this should be left to the trial judge to determine whether in the circumstances of the evidence as a whole these contemporaneous letters would amount to prior written consent of the lender within the meaning of cl 5.01(ii) of the agreement.
>
> It is also our view that s 92 of the Evidence Act does not absolutely bar the defendants from adducing evidence to vary the terms of formal agreement between parties. As asserted in the affidavits of the defendants there had been negotiations between Kung Beng Hung, the previous general manager of the plaintiff on the purpose of the loan and the intent of the initial drawdown of the RM1.5m on a quarterly basis. It is also averred by the defendant that when their true arrangement was not reflected in the agreement the defendants had raised certain queries and assurances were given by Kung to them.
>
> These averments are questions of fact which cannot be determined on affidavit evidence alone. As demonstrated in the following authorities, evidence of surrounding circumstances and factual background are admissible, and that collateral agreement can exist side by side with the main agreement which it contradicts.
>
> The law on collateral oral agreement is clearly spelt out in s 92(b) of the Evidence Act. It is recognised as one of the exceptions to the general rule forbidding extrinsic evidence to be adduced to contradict, vary, add to or subtract from, the terms of an agreement which had been reduced into the form of a document. In *Keng Huat*

A *Film Co Sdn Bhd v Makhanlall (Properties) Pte Ltd* [1983] 1 CLJ 186 (Rep) Mohamed Azmi FJ said:

> For the construction of a written agreement the established doctrine is firstly to exclude evidence of negotiations leading up to the contract on the ground that it is only the final agreement which records a consensus and as such evidence of negotiations is unhelpful; and secondly to exclude evidence of the parties' subjective intentions so that any individual purpose which either of them hopes to achieve by the agreement and their own interpretation and understanding of the agreement is not admissible. As against this, *evidence of surrounding circumstances and factual background have always been admissible.* (Emphasis added.)

[84] It must be noted that the above dicta was said in the context of allowing an appeal against the granting of a summary judgment application by the High Court. It must also be pointed out that s 92(b) of the Evidence Act 1950 which is said by the Supreme Court as the basis for allowing collateral oral agreements to be admitted is circumscribed by the condition found in s 92(b) itself which is reproduced below:

> (b) the existence of any *separate oral agreement*, as to any matter on which *a document is silent* and which *is not inconsistent with its terms,* may be proved, and in considering whether or not this proviso applies, the court shall have regard to the degree of formality of the document. (Emphasis added.)

[85] Thus it can be seen that even in allowing a collateral oral agreement to be admitted it is only in the narrow context where a document is silent and collateral oral term sought to be introduced must not be inconsistent with the written terms.

[86] Thus the principle of collateral oral agreement in *Eushun Properties* case cannot be read as derogating and deviating from the main provision of the section as can be seen in the caution issued by His Lordship Chang Min Tat FJ in *Tindok Besar Estate*'s case where in relation to the proviso in s 92(b) and (c) of the Evidence Act 1950 it was carefully couched as follows at p 233:

> The provisos qualify but they do not eliminate the main provisions of the section, so that *unless the additional evidence sought to be adduced falls within the scope of any of the provisions, it should not be allowed to be introduced as it would be to contradict, vary, add to or subtract from the terms of the agreement.* (Emphasis added.)

[87] If indeed there existed such representations (ie the lease duration representations) forming the basis of the purported collateral contract, one might have expected it to be referred to in some contemporaneous documents like that of the defendants' own solicitors who rendered his legal opinion in exh

'P4' as to whether the plaintiff could be compelled to lease Wisma CY for a total of 40 years. However, nowhere was there a single reference to the lease duration representation; not even a whiff of it. Incidentally, the defendants' solicitors, KS Lam & Co opined that the defendants could not compel the plaintiff to take up the premises at Wisma CY for the full 40 years.

[88] Where the oral evidence was totally inconsistent with the documentary evidence, the right approach to be taken would be to ensure that a 'credible explanation is proffered for the absence of any document' that ought to have been produced to support the oral evidence: *Kim Guan & Co Sdn Bhd v Yong Nyee Fan & Sons Sdn Bhd* [1983] 2 MLJ 8. On the facts of that case, the court observed:

> To assert that it was traditional among the Chinese business community to carry on business deals on the basis of mutual trust without troubling overmuch about the printed word, *while capable of explaining the absence of a written document or small deviations from it, does nothing to explain away the presence of a written document whose terms fundamentally contradict the oral evidence which a party wishes the court to believe.* (Emphasis added.)

[89] The evidence of the lease duration representation is hereby rejected as the same is not capable of coming within any exception to s 92 of the Evidence Act 1950 and in fact has the capacity the contradict, vary, add or subtract from the terms of the agreement to lease, the sublease and the other facility documents in these proceedings that confirm the duration of the sublease.

[90] To allow such a representation to be admitted under the guise of a collateral contract would be to give a carte blanche to any party to rewrite the terms of a contract whenever it is being sued and when it suits them. Where the terms of a contract is clear the court would not be supportive of any attempt to introduce an oral collateral term running alongside the main contract to contradict or vary the main contract. It has every right to be suspicious of such an attempt and it would strictly interprete the clear terms of the contract and would not be susceptible to any overtures to rewrite the contract.

THE FACTUAL MATRIX APPROACH IS ONLY WHEN THE WRITTEN TERMS ARE UNCLEAR

[91] Section 101 of the Evidence Act 1950 states that if a party desires the court to give judgement as to any legal right or liability which depend on the existence of facts which it asserts, the burden of proof of the existence of those facts lies with that person.

[92] It is trite law that where a contract is in writing the intention of the

parties must be found within the four walls of the contractual documents and it is not legitimate to have regard to extrinsic evidence: *National Coal Board v WM Neill & Son (St Helen) Ltd* [1984] 1 All ER 555. The principles set out in the aforesaid decision were adopted by the High Court of Malaya in the case of *Royal Selangor Golf Club v Anglo-Oriental (Malaysia) Sdn Bhd* [1990] 2 MLJ 163; [1990] 3 CLJ (Rep) 37.

[93] The Court of Appeal in *Mulpha Pacific Sdn Bhd v Paramount Corp Bhd* [2003] 4 MLJ 357 held that it is the court's duty to give effect to the bargain of the parties according to their intention and when that bargain is in writing the intention is to be looked for in the words used. It was further held that if the words are clear, there is very little that the court has to do and that the court must give effect to the plain meaning of the words.

[94] The Court of Appeal in *Setapak Heights Development Sdn Bhd v Tekno Kota Sdn Bhd* [2006] 3 MLJ 131; [2006] 3 AMR 410 held that it is axiomatic that it is the duty of the court to give effect to the clear intention of the parties as expressed in the clauses of an agreement.

[95] The decision of the Federal Court in *Berjaya Times Square Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd* [2010] 1 MLJ 597 at p 620 sets out the guidelines for interpreting contracts as follows:

> First, a court interpreting a private contract is not confined to the four corners of the document. It is entitled to look at the factual matrix forming the background to the transaction.
>
> Second, the factual matrix which forms the background to the transaction includes all material that was reasonably available to the parties. Third, the interpreting court must disregard any part of the background that is declaratory of subjective intent only. Lastly, the court should adopt an objective approach when interpreting a private contract.

[96] Having regard to the *Berjaya Times Square*'s case and given that the language used in the various contemporaneous documents relating to the duration of the sublease is consistent, the objective result of any construction exercise carried out, would demonstrate that the duration of the sublease should be determined from reviewing the multitude of documents confirming the said period, as ten years.

[97] The Court of Appeal held in *Guan Teik Sdn Bhd v Haji Mohd Noor bin Haji Yakob & Ors* [2000] 4 MLJ 433 that in cases where conflicting evidence is presented before a court, it is the duty of the court not only to weigh such evidence on a balance of probabilities but it is also incumbent upon the court

to look at all the surrounding factors and to weigh and evaluate the contemporaneous documents that may tend to establish the truth or otherwise of a given fact.

[98] It was held in the *Guan Teik*'s case that the learned trial judge had failed to direct his mind as to the probative effect of contemporaneous documents and ought to have after accepting the (oral) evidence, weighed it against the contemporaneous documents and evaluate whether such documents support the oral testimony. It was also held that this sort of evaluation exercise was most crucial where the witnesses testified to events that happened 18 years ago whilst the contemporaneous documents speak of matters then existing at the time such documents were issued.

[99] It is another way of saying that documents do not lie and they do not suffer from a poor recollection of memory. The print is preserved for posterity; it operates objectively. Human nature on the other hand with its recollection of oral representation so called, falls into the realm of the subjective. It has a tendency to embellish, exaggerate and even extrapolate into existence that which was not there to begin with! All in the exercise of exonerating or excusing oneself from liability.

[100] Whilst the factual matrix argument is helpful where the written terms are unclear or are susceptible to a different interpretation or even in cases where the terms are silent, it is totally inappropriate where the terms of the written contract is a clear as crystal. Indeed a text may derive its colour from its context but it cannot be made to change its colour from its context; otherwise it becomes a pretext!.

[101] Based on all the above arguments I have no hesitation in rejecting the lease duration representation.

WHETHER THERE WAS SUFFICIENT WRITTEN NOTICE TO TERMINATE THE SUBLEASE

[102] The defendants contended that quite apart from the breach of the oral lease duration representation, there was in any event no proper written notice of six months under s 9.11 of the sublease agreement. The plaintiff started occupying Wisma CY from 1 April 1992.

[103] D3 admitted that the plaintiff first informed D1 of its intention to move out of Wisma CY as early as May 1999 ('notice of intention to vacate'). The plaintiff had several meetings in 1999 and thereafter with representatives of D1 to discuss vacating Wisma CY and how D1 would deal with the same.

The plaintiff summarised the events leading up to the actual leaving of Wisma CY as follows:

(a) a meeting was held on 21 October 1999 between DW4, DW5, PW7 and WSC discussing the plaintiff's intended relocation from Wisma CY to new premises;

(b) on 5 October 2000, D1 sent a letter to the plaintiff indicating that it had been aware of the plaintiff's intention to relocate for the past 17 months (p 1574 of bundle H);

(c) by a letter dated 10 October 2000 the plaintiff gave an estimate of the handover dates to D1; and

(d) on 16 January 2001 the plaintiff sent a letter to D1 indicating that there was no change in the handover dates (p 26 of bundle I).

[104] It is my finding that D1 knew of the plaintiff's imminent move more than two years before the plaintiff actually vacated Wisma CY, and therefore had more than six months' notice of the plaintiff's intention to move out. No written objections were made by the defendants regarding the need for a written notice. By conduct of the defendants and through the various discussions of the mechanics of vacating different floors at slightly different times and the various penalty and exit payments and the acceptance of these various payments by D1 from the plaintiff, the plaintiff is entitled to believe that the defendants and in particular D1 had waived the requirement of a formal written notice to terminate the sublease. Even if that had not been waived, the various letters from the plaintiff to D1 informing it of the various handover dates for the various floors constitute sufficient notice in writing to D1.

[105] In a letter dated 16 January 2001 issued by the plaintiff to D1 it is written as follows:

> We are now able to confirm that there is *no change in the handover dates, as per our letter dated 25 October 2000,* with the exception of Level 6 and Level 12 which will be handed over to you on 31 March 2002 and 31 December 2002 respectively. (Emphasis added.)

[106] D1 accepted the payment of RM620,487 as the penalty for early termination in accordance with s 9.11(b)(ii) of the sublease ('the penalty for early termination') and the same was recorded in the letter from the plaintiff to D1 dated 19 March 2001.

[107] D1 also accepted the payment of the sum of RM507,149.20 as exit

costs in lieu of reinstatement ('the exit costs'). D1 even authorised the plaintiff to credit the penalty for early termination and exit costs. A

[108] Up to the point when the plaintiff vacated Wisma CY in early 2001, there was no objection or complaint regarding the lack of a written notice. Additionally the plaintiff continued to lease space on some of the floors and entered into a further tenancy agreement dated 3 November 2003 in respect of Levels 7, 8, 12 and 13 of Wisma CY and further arrangements thereafter. B

[109] Learned counsel for the plaintiff referred the court's attention to the case of *Friary, Holroyd and Healey's Breweries Ltd v Singleton* [1899] 2 Ch 261 (CA) ; (1899) 81 LT 101 where a company negotiated with the landlord for the exercise of an option to purchase a lease, and no objections were taken that no sufficient notice to exercise the option had been served on her. When the company exercised the option, however, the landlord took the objection. The Court of Appeal held that the landlord had 'waived' her right to notice. Jeune P said: C D

> … it would be unjust if, after conducting the negotiations all through, on the hypothesis that the plaintiffs had a right to purchase under the lease, she could turn round when it was too late to set the matters right and say that no notice had been given. E

[110] The plaintiff also referred to a more current case in New Zealand in *Fifield v W&R Jack Ltd* [2000] 3 NZLR 129 (PC), where a landlord 'waived' an objection to a late counter notice under a rent review clause. Lord Hobhouse said: F

> In Their Lordships' opinion, the conduct of the appellants was only consistent with their having agreed not to rely upon the lessee's non-compliance with the strict time requirement. G

[111] In the light of the length of time that D1 had to object to the lack of any formal written notice if it had wanted to and having regard to the fact that it had never in fact made any objections to the lack of written notice until the commencement of these proceedings and to the fact that D1 was fully conscious of and indeed was constantly in touch through the various meetings with the plaintiff on the fact of the plaintiff vacating Wisma CY in stages, I find that the requirement of a formal written notice under cl 9.11 of the sublease agreement had been waived by D1 or that alternatively there has been more than sufficient written notice in the various exchange of letters referred to above. H I

A THE ARGUMENT OF NO RENTAL PAYMENT AND SO NO NEED TO REPAY LOANS

[112] Learned counsel for the defendants submitted that the failure of the plaintiff to reply to two letters issued by D1 stating that the rental payment will be utilised to set-off the instalments payments is fatal to and militates against the plaintiff's assertion that there is no lease duration representation that had been made. The letter of 8 August 2001 from D1 to the plaintiff reads:

> 2. We responded that our default was precipitated by Citibank's decision to relocate and as we have not been able to find a substitute tenant given the very short time available to us our cash flow has been vary badly affected. *For the record, it is our understanding that the facilities given were based on the premise that repayment of the loan was from the rental proceeds of Citibank.*
>
> *We wish to reiterate that we did not chose to default on our repayment of the said facilities. We have been unfairly confined to a position that is grossly unfavourable.* (Emphasis added.)

[113] Then there was the letter from D1 to Ernst & Young as the receiver and manager of D1 and a copy of the letter was sent to the plaintiff (p 1634 of bundle H):

> We regret that due to your rejection, Pembangunan Cahaya Tulin Sdn Bhd loses a rental income of RM23.638.00 per month which is to be utilised *towards repayment of outstanding loan to Citibank Bhd.* (Emphasis added.)

[114] The defendants submitted that the silence of the plaintiff and its failure to reply is fatal to the plaintiff that sought to refute the lease duration representation. As authority learned counsel for the defendants cited the case of *Wong Hon Leong David v Noorazman bin Adnan* [1995] 3 MLJ 283; [1995] 4 CLJ 155 where at p 289(MLJ); p 159(CLJ), His Lordship Gopal Sri Ram JCA (as he then was) observed:

> In this context, we recall to mind the following passage in the judgment of Edgar Joseph Jr J in *Tan Cheng Hock v Chan Thean Soo* [1987] 2 MLJ 479–487:
>
> > In *Wiedemann v Walpole* [1891] 2 QB 534, 537 an action for breach of promise of marriage, it was held, that the mere fact that the defendant did not answer letters written to him by the plaintiff in which she stated that he had promised to marry her, was no evidence corroborating the plaintiff's testimony in support of such promise. Lord Esher M, in his judgment, remarked,
> >
> > Here, we have only to see whether *the mere fact* of not answering the letters,

> *with nothing else* for us to consider is any evidence in corroboration of the promise. (Emphasis added.) Earlier, in his judgment, he said, *'Now there are cases — business and mercantile cases in which the courts have taken notice that, in the ordinary course of business, if one man of business states in a letter to another that he has agreed to do certain things, the person who receives that letter must answer it if he means to dispute the fact that he did so agree.* (Emphasis added.)

[115] Further support for this proposition can be found in the Court of Appeal case of *Ling Hock Ling v Tai Lian Development Co* [2006] 6 MLJ 712 where it was held at p 714 that:

> Now, here we have a case where the defendant upon receiving copies of the plaintiffs letters to FELDA did not make any protest about his description as a subcontractor. If it was not the truth he should have said so. But he kept quiet. In these circumstances it does not lie in his mouth to say that he was not the plaintiff's subcontractor. See *Wong Hon Leong David v Noorazman bin Adnan* [1995] 3 MLJ 283.

[116] I agree with learned counsel for the plaintiff that there was no need for the plaintiff to reply to either the letter dated 8 August 2001 or the letter dated 18 October 2011 as in none of the two letters did its authors raise any query or ask for further information such that the plaintiff was called upon to reply. In fact the plaintiff did not dispute that D1's repayment of the facilities was to be set-off via the rental proceeds from the plaintiff's lease of Wisma CY. What the plaintiff was disputing was that it was obligated to stay at Wisma CY until D1 had fully repaid the facilities. No where in any of the letters was it expressed that there was:

(a) a binding collateral contract between the parties;

(b) an agreement or understanding that the plaintiff would stay for 40 years in Wisma CY; and

(c) an agreement or understanding that the plaintiff would stay at Wisma CY at least until D1 has fully rapid all the facilities.

[117] Learned counsel for the plaintiff pointed out that the *Wiedemann v Walpole* [1991] 2 QB 534 (*Wiedemann*'s case) cited for the proposition of law must be viewed in its proper perspective. It was a case concerning a letter written by the plaintiff stating that the respondent had promised to marry her. This letter was not responded to by the respondent. In his judgment Bowen LJ stated:

> It would be a monstrous thing if the mere fact of not answering a letter which charges a man with some misconduct was held to be evidence of an admission by him that he had been guilty of it. There must be some limitation placed upon the

> doctrine that silence when a charge is made amounts to evidence of an admission of the truth of the charge. The limitation is, I think, this: *silence is not evidence of an admission unless there are circumstances which render it more reasonably probable that a man would answer the charge made against him than that he would not.* (Emphasis added.)

[118] Kay LJ stated further:

> The only fair way of stating the rule of law is that in every case *you must look at all the circumstances under which the letter was written* and you must determine for yourself whether the circumstances are such that the refusal to reply alone amounts to an admission. (Emphasis added.)

[119] I agree with learned counsel for the plaintiff Mr Rabindra Nathan that in the circumstances of the case there was no need for the plaintiff to reply D1 and much less a non-reply can tantamount to the plaintiff's acceptance of the fact that it is to stay in Wisma CY for 40 years and paying rental for the entire duration which rental payments shall be set-off from the loan repayments.

THE OUTGOINGS REPRESENTATION

[120] Section 7.02 of the sublease agreement between D1 and the plaintiff states:

> During the term hereby created the Sub-Lessor will, subject to Section 6.03 hereof, bear pay and discharge all quit rent, assessment and other rates imposed on and payable in respect of the Demised Premises and shall produce to the Sub-Lessee copies of all receipts for such payment.

[121] Section 6.03 states:

> The Sub-Lessee shall pay as and when required by the Sub- Lessor an additional sum over and above the Monthly Rents hereby reserved by way of quit rent, assessment, rates or other impositions … which are levied and imposed upon or in respect of or attributed to the Demised Premised over and above the amount levied and imposed at the commencement of the term hereby created …

[122] In respect of the increased outgoings, D1 via letters to the plaintiff dated 7 April 1999 and 28 May 1999 (pp 1544–1553 of bundle H) furnished the plaintiff with information on the same for consideration and via invoices from D1 to the plaintiff dated 18 November 1999, made requests for sewerage charges in the sum of RM306,798 and assessment charges in the sum of RM570,927.50 (pp 16–20 of bundle I). Arising from the aforesaid correspondence and invoices, a settlement of the sums claimed as increased

outgoings was achieved and the same was recorded in a letter from the plaintiff to D1 dated 20 March 2000 (pp 22–23 of bundle I). D3 on behalf of D1 accepted and confirmed and acknowledged that D1 was agreeable to the settlement of outgoings.

[123] Based on the principle of 'accord and satisfaction' expounded by Scrutton LJ in *British Russian Gazette and Trade Outlook Ltd v Associated Newspapers Ltd* [1933] 2 KB 616, it would therefore appear that there is an accord and satisfaction of the sum claimed by D1 from the plaintiff vis-a-via the claim for increased outgoings in this suit. Scrutton LJ at p 643 had expounded as follows:

> Accord and satisfaction is the purchase of a release from an obligation whether arising under contract or tort by means of any valuable consideration, not being the actual performance of the obligation itself. The 'accord' is the agreement by which the obligation is discharged, The 'satisfaction' is the consideration which make the agreement operative.

[124] The above dicta of Scrutton LJ was quoted with approval by His Lordship Abdul Malik Ishak J (as he then was) in *Gan Kui Lan v Chia Kor Loong (No 1)* [2002] 7 CLJ 141 at p 151. His Lordship Ramly Ali J (as he then was) in *Solid Kitchen Sdn Bhd v Aman Teguh-WICC JV Sdn Bhd & Anor* [2003] 5 MLJ 412; [2003] 1 LNS 54 observes as follows:

> The approach court should take whether there has been 'accord and satisfaction' both in law and fact, is well settled and the best exposition of it appears in Roskill J's judgment in *Margaronis Navigation Agency Ltd v Henry W Peabody & Co of London Ltd* [1965] 1 QB 300 at p 318:
>
> > Where the question arises whether a particular obligation has been performed, the first thing that has to be done is to ascertain the nature of the obligation. That depends upon the construction of the contract and the construction of contract is, of course, a question of law. But that is only one part of the equation. Having ascertained what the obligation is, one then has to measure the performance, and see whether the performance fulfils the obligation. That again ultimately is either a question of law or a question of mixed facts and law; not perhaps in every case, but is a great many cases.

[125] Learned counsel for the plaintiff also submitted that the doctrine of estoppel prevents D1 from pursuing a claim for increased outgoings.

[126] Section 115 of the Evidence Act 1950 governs the operation of the doctrine of estoppel. This section provides:

A When one person has by his declaration, act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, otherwise than but for that belief would have acted, neither he nor his representative in interest shall be allowed in any suit or proceeding between himself and that person or his representative in interest to deny the truth of that thing.

B

[127] In the case of *Public Textiles Berhad v Lembaga Letrik Negara* [1976] 2 MLJ 58, Raja Azlan Shah FJ (as his Royal Highness then was) quoted Scrutton LJ in the Court of Appeal (*Greenwood v Martin's Bank Ltd* [1932] 1 KB 371 , at p 380), and stated the principle as follows:

C

The classic exposition of the principle of estoppel is that given by Parke B in delivering the judgment of the court in *Freeman v Cooke* (1848) 2 Ex 654 663._He cites the rule in *Pickard v Sears* (1837) 6 A & E 469 474:'That, where on, by his words or conduct, willfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, or to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time.'

D

[128] In the case of *Tenaga Nasional v Teobros Development Sdn Bhd* [2008] 6 MLJ 391; [2008] 1 LNS 395, it was held as follows:

E

Looking at estoppel on a wider perspective, it has always been perceived that estoppel involves the principles of justice and equity. It concerns the principle that a person who has led another to believe in a certain state of affairs from going back on the words or conduct when it is unjust or unconscionable for him to do so (per Lord Denning MR in *Moorgate Mercantile Co Ltd v Twitchings* [1976] 1 QB 225 at p 241, [1975] 3 All ER 314 at p 323, (CA)). In modern times estoppel by representation is frequently applied and invoked. It arises when there is representation made either by statement or by conduct. It is said that conduct must necessarily include negligence (*Freeman v Cooke* [1848] 2 Exch 654 at p 664) and silence (*Pacol Ltd And Others v Trade Lines Ltd and R/l Sif IV ('The Henrik Sif') Vol 1 Lloyd's Law Reports 456*).

F

G

[129] Along the same vein, the Court of Appeal in the case of *Raju Jayaraman Kerpaya v Chung Khiaw Bank Ltd* [1997] 2 MLJ 590 held:

H

Now, of the doctrines invented by the Court of Chancery, estoppel is surely the most flexible. It is a rule by which a court does justice between parties to litigation according to the facts and substantial merits of the case. The only question at issue where estoppel is relied upon is whether it is just that the party sought to be estopped ought to succeed upon a particular issue or in the action generally, as the case may be (see *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331).

I

[130] I agree with the plaintiff's submission that the a claim by the

defendants herein for increased outgoings, based on the outgoings representation and having accepted and declared that the plaintiff shall not be liable for further payments in respect of outgoings, cannot be maintained as there has been accord and satisfaction with respect to the claim. Furthermore the doctrine of estoppel ought to be invoked in these proceedings to prevent the defendants from pursuing their counterclaim for the increased outgoings. I also consider as untenable the contention of the defendants that they were under economic duress to accept the settlement outgoings. If they were protesting, they could have accepted the settlement outgoings on a without prejudice basis and under protest.

THE RESTRUCTURING REPRESENTATIONS

[131] It is the defendants' case that the plaintiff's breach of the alleged collateral agreement caused D1 to be unable to repay the facilities owing to the plaintiff. The associated companies were therefore forced (allegedly by the plaintiff) to make repayment on behalf of D1, which in turn put the associated companies in financial difficulty as well.

[132] It was contended by the defendants and the associated companies that in view of the financial difficulties faced by D1 and the associated companies, the plaintiff offered to restructure the facilities, representing that:

(a) the associated companies would be given indulgences and no action would be taken against them until their facilities were restructured; and

(b) the facilities given to D1 would be restructured upon mutually favourable terms.

[133] The makers of the aforesaid representations were identified as:

PW1, PW3, PW4, PW5, PW7 and WSC.

[134] The plaintiff led evidence to confirm, in accordance with the replies to the defences and counterclaims, that the representatives of the plaintiff did not make any such representations to D1.

[135] It was explained by PW2 Dato' Tan Keng Hoon ('Allen'), the country manager of the plaintiff's consumer banking business, that all of these witnesses did not have the authority to make such representations. PW5 Mr Chew Seong Aun, the plaintiff's consumer bank's CFO, gave evidence to confirm that he did not attend the September to December 1999 discussions where the alleged representation was said to have been made.

[136] It was further explained by PW1 that PW4 only joined the plaintiff in

April 2000 and hence, could not have participated in the discussions held during September to December 1999 and accordingly, could not have made any such representations. PW1 Mr Ang Kar Leong was the premises head of the corporate realty services of the plaintiff. PW4 Mr Cheng Kok Chin was the country head of corporate realty services.

[137] Learned counsel for the plaintiff summarised below the crux of the evidence of these witnesses under cross-examination. It should be noted, however, that only two of the six officers of the plaintiff were working in the Credit Department of the plaintiff. The other four officers had no connection whatsoever to the said facilities and even less so with regard to any possible restructuring agreement.

PW1 AND PW3

[138] In the course of giving evidence, PW1 and PW3 were not questioned as to the representations they were alleged in the pleadings to have made. Therefore, based on the principle set out in *Browne v Dunn* (1893) 6 R 67 that the cross-examiner must put his case to the witness, it must follow that the failure to do so means the allegation in the pleadings that PW1 allegedly made has not been evidentially substantiated.

[139] PW3 Gwee Sin Siew was the South East Asia Regional Cluster Head of the Corporate Realty Services of the plaintiff.

PW5

[140] PW5 also confirmed that he did not attend any of the meetings in September to December 1999.

PW7

[141] During cross-examination, PW7 confirmed that he did not make any representations with respect to restructuring. He also confirmed in his witness statement that he did not have the authority to make any of the alleged representations.

WSC

[142] During cross-examination, WSC was asked whether he would be able to recall if he made any representations during the various meetings with D1.

[143] WSC responded as follows:

> In the first place, I would not have because I didn't have the authority. And if I were to have made something like that, when I didn't have the authority, it's something which is very serious. So no, I wouldn't have.

[144] The classic House of Lords case of *Browne v Dunn* (1893) 6 R 67 states the principle that 'wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it follows that he believed that the testimony given could not be disputed at all'.

[145] His Lordship Gopal Sri Ram JCA (as he then was) cited the principle with approval in the Court of Appeal decision of *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770:

> It is essential that a party's case be expressly put to his opponent's material witnesses when they are under cross-examination. A failure in this respect may be treated as an abandonment of the pleaded case and if a party, in the absence of valid reasons, refrains from doing so, then he may be barred from raising it in argument. It is quite wrong to think that this rule is confirmed to the trial of criminal causes. It applies with equal force in the trial of civil causes as well.

[146] Similarly, in *Soon Peng Yam & Anor v Bank of Tokyo-Mitsubishi (Malaysia) Bhd* [2004] 2 MLJ 31, Alauddin JCA (as he then was) observed that the failure to cross-examine a witness on a particular area of his evidence will be deemed to be an acceptance of that part of his evidence.

[147] DW4 said that D1, D2 and its other associated companies disagreed to cross-collateralisation as the common director of the companies, Lim Yew Jin who is also D3 and DW6, objected to WSC's proposal.

[148] Between October 1999 and October 2002, there were two attempts at restructuring the facilities granted by the plaintiff to D1. Neither of the attempts at restructuring resulted in the intended reduction of the total indebtedness under D1's facilities. Consequently the plaintiff engaged in a group-wide restructuring of the facilities involving D1, D2, Ampang Ukay, Kansas and Unique Creation. Discussions concerning the terms and conditions of the restructuring were ongoing during most of 2002.

[149] Like all restructuring that a borrower would request or that which a bank is constrained to undertake for its borrower when its borrower has cash flow problems, it is always a matter of negotiations. The plaintiff did accommodate some but not all of the requests made by D1 and the associated companies. The plaintiff agreed to drop its previous suggestion of cross-collaterisation that it had earlier wanted to impose on all the companies involved. There was the element of give and take and it was not a case of the

plaintiff shoving down the defendants' throat or that of the associated companies on a take it or leave it basis; proceeding as it were from a pompous and patronising platform.

[150] The plaintiff bank was within its legal rights under the various facilities agreements to vary and restructure the repayment obligations of the various borrowers comprised in D1, D2 and the associated companies. At the end of months of negotiations, restructuring letters all dated 16 December 2002 were issued to D1, D2 and the associated companies. These letters were duly signed and returned to the plaintiff without any protest or reservation of rights.

[151] The defendants argued, however, that the facilities were restructured unilaterally and that the defendants and the association companies were forced to accept the restructing agreement due to the plaintiff's legal and economic threats.

[152] DW4 said that the restructuring of the loans were made on unilateral terms in that though the period of repayment for all the loans were extended there were no additional loans granted by the plaintiff to D2 and its associated companies to complete on-going projects.

[153] It must not be forgotten that it was the East Asian financial crisis at that time. Economies that were said to have strong fundamentals that had enabled them to be economic miracles had become economic meltdowns! Many companies went into liquidation and even banking business was shaken to the core. Parties were at a negotiation stage and to expect the plaintiff to grant more loans to D2 when D1 had already been in default and at a time when banks were recalling back loans would of course be difficult for the plaintiff to comply. The long and short of the restructuring exercise was that at the end of the day restructuring agreements with D1, D2, Kansas, Ampang Ukay and Unique Creation were executed as can be seen at pp 1584–1589 of bundle H, 1590–1592 of bundle H, 358–361 of bundle J, 363–366 of bundle J and 367–372 of bundle J respectively.

[154] When a borrower is already in default, it cannot expect to negotiate on an equal footing with the bank. In reality both borrowers and bankers have pressures of their own to fend and manage when the whole East Asian economies are in turmoil. A Chinese proverb tells us that if a borrower owes a bank RM10m the borrower has cause for worry but if the borrower owes the bank RM100m, the bank would have cause for worry when there is a default! It is a matter of perspective and proportion and no one is unaffected by the pressures of the harsh realities of business and banking when cash is in short supply and the share market is at an all time low.

[155] That by itself does not attract the application of the doctrine of inequality of bargaining powers to set aside the terms agreed upon and accepted by the defendants and the associated companies of the restructured facilities. Learned counsel for the defendants Mr Arthur Wang had referred to the dicta of Woodward CJ in *CM Naested v The State of Perak* [1925] 5 FMSLR 185 which was quoted with approval in *Chin Nam Bee Development Sdn Bhd v Tai Kim Choo & 4 Ors* [1988] 2 MLJ 117; [1988] 1 CLJ 457:

> Under these circumstances it is impossible to consider the payment as a voluntary one. *The parties were not on equal terms. On the one side was the plaintiff a private individual and his agents a mercantile firm, on the other the Government of the State which had the power of saying 'if you do not pay you shall not have your grant'.* (Emphasis added.)

[156] The facts there and the circumstances are totally different from what we have before us. There the plaintiff was found to have had to pay a sum of money to the defendants without any consideration, at the risk of losing their grant of land. Here the plaintiff was prepared to grant extension of time to the defendants and the associated companies to service their facilities and to withhold legal action in the meanwhile though it was within the bank's right to pursue legal action upon default. I would say that the doctrine of inequality of bargaining powers is only applicable in a case of a David and Goliath situation where the scale is tilted steeply and sharply against the weaker party in a take it or leave it scenario often times aggravated by standard form contracts in an unfair monopolistic bargaining position.

[157] Management and negotiation gurus would tell us that in real life and more so in a case where the borrower is already in default, there cannot be expected a case of banker and borrower negotiating on an even bargaining power position. It is unrealistic to expect that which perhaps is only attainable in a Utopian world. That by itself does not justify the borrower invoking the doctrine of inequality of bargaining powers to set aside the whole restructured facilities.

[158] In this case, the main person behind the various facilities extended to D1 and D2 and the associated companies is D3 himself. From his own evidence in court we gather that he is a savvy, high net-worth businessman with some 30 years experience in the housing development and construction industry. We can surmise that he is often surrounded by partners and having easy access to lawyers and financial consultants to advise him. Surely he would be able to weigh and consider carefully and cautiously before accepting the restructured terms of the facilities considering the circumstances that he and the companies that he controlled, found themselves to be in.

[159] Like all commercial decisions made in the rough and tumble of sometimes harsh economic realities and banking decisions are no different, there will always be the pressure of deadlines and mounting interests. Does it then mean that agreements entered into under such circumstances can always be set aside by the borrower that would only be too ready to retort that it had little choice? The leading common law decision is the case of *Pao On & Ors v Lau Yiu Long & Ors* [1980] AC 614. The Privy Council made it very clear that:

> Duress, whatever from it takes, is a coercion of the will so as to vitiate consent. Their Lordships agree with the observation of Kerr J in *Occidental Worldwide Investment Corp v Skibs AS Avanti* [1976] 1 Lloyd's Rep 293, 336 that *in a contractual situation commercial pressure is not enough. There must be present some facto 'which could in law be regarded as a coercion of his will so as to vitiate his consent.*' This conception is in line with what was said in this board's decision in *Barton v Armstrong* [1976] AC 104, 121 by Lord Wilberforce and Lord Simon of Glaisdale observations with which the majority judgement appears to be in agreement. (Emphasis added.)

[160] Their Lordships went on to state at p 636 that in determining whether there was a coercion of will such that there was no true consent, it is material to inquire such questions as whether:

(a) the person alleged to have been coerced did or did not protest?

(b) at the time he was allegedly coerced into making the contract, he did or did not have an alternative course open to him such as an adequate legal remedy?

[161] I find that based on the letters of reply dated 16 July 2002 in pp 1632–1633 of bundle H, D1, D2 and the associated companies were to a large extent agreeable to the repayment periods and amounts as stipulated by the plaintiff. This was a fact admitted to by DW4 under cross-examination. DW4 Mr Len Min Vong was the general manager of D2.

[162] More importantly, each of the companies signed the relevant restructuring letters (pp 1589, 1592 of bundle H and pp 262, 366 and 372 of bundle J) within the time frame for acceptance. Each such letter confirming that the terms of the restructuring were accepted and with respect to D1, a Directors' Circular Resolution was also issued accepting the terms of the restructuring contained in the letter dated 16 December 2002 to D1. I agree with learned counsel for the plaintiff that clearly there was no protest in the sense required by the doctrine.

[163] Significantly, the only document that there is which was written in the immediate aftermath of the restructuring is a letter dated 6 January 2003 from D2 to the plaintiff, signed by D3.

[164] Plainly, from the language adopted in this letter, which was issued post restructuring, D3 on behalf of JBT (D2) clearly thanked the plaintiff for the restructuring. It was the polite language of praise-nothing palpable of pressure applied. It signified closer of a rough patch and a prelude to a more pleasant phase of things. The same is evident in exh 'WSC3', the first line of which reads:

> We thank you for finalising the restructure of JBT Group Loan Facilities.

[165] It should be borne in mind that the defendants had various alternative options open to them besides accepting the restructuring agreement that was offered by the plaintiff. I agreed with learned counsel for the plaintiff that for instance, it could have taken steps as soon as it was aware that the plaintiff would be leaving to source for other tenants. The defendants could also have asked the plaintiff if it would be open to renewing the lease and then subletting the lease to someone else.

[166] If this was not a viable option, it could have taken the initiative to obtain refinancing from a different financial institution. It could even bring legal proceedings against the plaintiff, since it believed that the plaintiff was not holding up its end of the alleged promise to grant additional loans or to restructure the facilities on terms agreeable to all parties.

[167] The bottom line is that the defendants had numerous options available to them. They were not pushed into a corner such that they had no commercially viable choice but to accept the restructuring agreement.

[168] In the recent Singapore decision in *EC Investment Holding Pte Ltd v Ridout Residence Pte Ltd & Anor (Orion Oil Ltd and another, interveners)* [2011] 2 SLR 232 at p 258 para (52), Quentin Loh J, citing Treitel's 'The Law of Contract' held that 'lawful commercial pressure must *never* be mistaken for 'duress' capable of avoiding a contract.'

[169] His Lordship Quentin Loh J at p 258 para (49), held that:

> … courts must approach the issue of duress with caution because of the need for certainty in commercial contracts and the bargaining process. It has been said time and again that our courts are always mindful of the need for contractual certainty and predictability, especially in commercial contracts, see eg, *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR

(R) 1029 ('Zurich Insurance') at p (111) and *Forefront Medical Technology (Pte) Ltd v Modern — Pak Pte Ltd* [2006] 1 SLR (R) 927 at p (26). We are not yet in Utopia and so there remains a distinct and discernible difference between what is 'illegitimate' and what is 'unconscionable' and it is worth remembering that what is unconscionable is not necessarily illegitimate.

[170] DW4 made reference to the fact that there were threats of foreclosure from the plaintiff and that the defendants did not have the upper hand in the restructuring negotiation. Further the plaintiff capitalised on a higher bargaining power to force D1 to accept the unilateral restructuring agreement. All these pressures and threats of legal action, it was submitted by learned counsel for the defendants and the associated companies, amounted to economic duress.

[171] The plaintiff was willing to grant an extension of repayment schedule in order to assist the defendants in the repayment of the facilities. It should be noted that the plaintiff also agreed to a restructuring of the facilities in 2002. Only after payment was not forthcoming subsequent to the restructuring agreement did the plaintiff initiate these proceedings. As such, it is clear that the plaintiff made every reasonable effort to help the defendants meet their obligations under the facilities. Hence, the arguments that the defendants were placed under duress are unsustainable.

[172] The defendants contended that:

(a) the associated companies had to assist D1 in the servicing of its loan repayments;

(b) the associated companies were placed in financial difficulties due to the assistance they had to give in repaying D1's loan obligations, and

(c) the officers of the plaintiff promised D1 and the associated companies that they would be given indulgences in the payment of their respective loan.

[173] Based on the table of transfer of funds (attached to the plaintiff's submissions in appendix C) the following can be seen:

(a) only D2 and Ampang Ukay are recorded as having transferred funds to assist in the repayment of D1's loan. There is no record of Unique Creation or Pancaran Nilai making any repayment on behalf of D1;

(b) Ampang Ukay only made two fund transfers, in the total of RM428,000;

(c) apart from the amount of RM1,374,731.46 and the RM2m the amounts transferred by JBT as D2 are not substantial;

(d) the RM2m transferred to make repayments for D1's account was part of

the RM12m proceeds of the sale of the land from Kansas to Muafakat Kekal Sdn Bhd. The rest of the proceeds were used to settle the accounts of D2, Ampang Ukay and Unique Creation; and

(e) that the sum of money paid on D1's behalf was dwarfed by the amount of money owed by the associated companies to the plaintiff.

[174] If economic duress can be so easily and successfully raised to evade one's liability to pay under a defaulted loan, no banks would want to enter into any negotiations to restructure a loan when the borrower has cash flow problem or is already in default. Banks might as well sue straight away based on the terms negotiated when the loan was granted for at that time the borrower cannot have resort to any undue pressure exerted on it by the banks to vitiate the restructured loan agreement.

[175] In view of the above, I agree with the plaintiff that the payments made by Ampang Ukay and JBT as D2 were based on internal arrangements between the associated companies and JBT. Apart from a few insubstantial payments, there is no proof of any material assistance from the associated companies based on any promises made by the plaintiff's officers.

[176] Further, as the guarantor of D1, D2 was obliged to assist D1 make payment if D1 was unable to do so.

[177] I therefore held that there was no restructuring representations made that had been breached by the plaintiff. The restructured loans with D1, D2 and the associated companies were on terms mutually agreed upon and the defence of economic duress does not avail the defendants and the associated companies in the circumstances of this case and the four related suits.

THE SECOND BUILDING REPRESENTATION

[178] It is the case of D1 that it was instructed by the plaintiff to acquire six shop-lots on land adjacent to Wisma CY sometime in 1994 for the purpose of the construction of an 18 storey building ('the proposed second building') that would be used by the plaintiff. As the proposed second building was not constructed, D1 claims against the plaintiff for losses sustained for the depreciation of the said adjacent land.

[179] According to DW1's evidence-in-chief the management of the plaintiff approached D1 to construct an office building on land adjacent to Wisma CY to meet the plaintiff's then current and future space requirements.

Discussions were purportedly held between D3 and Lian Yuen Fatt ('LYF'), the plaintiff's Deputy Country Head of Consumer Banking, to this effect sometime in 1994.

[180] The plaintiff extended several facilities to the defendants to acquire the land on which the second building would be constructed:

(a) an overdraft facility dated 23 December 1994 in the amount of RM4m to finance the acquisition of three vacant commercial lots for the development and construction of a 16 storey office building;

(b) an overdraft facility dated 13 March 1996 in the amount of RM1.28m to finance the acquisition of one three storey shop house; and

(c) an overdraft facility dated 9 April 1997 in the amount of RM2.85m to finance the acquisition of two three storey shop houses.

[181] DW3, DW5 and DW6 all contended that the repayment of these facilities was to be on the same understanding as the previous facilities granted to construct and develop Wisma CY.

[182] Learned counsel for the plaintiff stressed that the plaintiff disputes that Lian Yuen Fatt took the initiative to ask D1 to acquire the said land to construct the building for the plaintiff. Moreover, if Lian Yuen Fatt made such representations to D1, he did not have the authority to bind the plaintiff as such.

[183] Further, upon cross-examination by learned counsel for the plaintiff, DW3 contradicted his earlier evidence by agreeing that:

(a) it was known in the market that the plaintiff was exploring options for the construction of a second building to meet its growing space requirements;

(b) it was D1 that came to know that the plaintiff was exploring the option of a second building; and

(c) it was D1 that offered to work with the plaintiff.

[184] It was the plaintiff's contention that D1 seized what it saw to be a commercially viable opportunity to build a commercial building next to Wisma CY. PW2, for instance, noted in his supplementary witness statement that the plaintiff's presence in Wisma CY helped increase commercial activity all around the building, attracting many businesses to be set up in that area. D3 as a shrewd and seasoned businessman would therefore have sensed the

opportunity of having a commercial building built in such an area. DW5 himself stated that D1 agreed to acquire the said land because the defendants thought 'it was a good opportunity'.

[185] The plaintiff argued further that there was no similar understanding of any kind with regard to the facilities granted to the defendants to construct Wisma CY and the facilities granted to acquire the six lots of land, in that:

(a) the plaintiff only funded the acquisition of the six lots of land and not the construction and development of the entire project;

(b) the proposed second building was the defendants' own project;

(c) there was no commitment on the plaintiff to occupy the proposed second building besides a first option;

(d) unlike the construction of Wisma CY, there was no agreement to build or lease the proposed second building; and

(e) there was no agreement to finance any construction of the proposed second building.

[186] I agree with the plaintiff that there is therefore a clear and discernable difference in the position with regard the construction of Wisma CY and the acquisition of the six lots of land.

[187] The defendants' case is that the second building was to be built specifically for the plaintiff's use in order to cater to the plaintiff's need for space.

[188] The plaintiff argued, however, based on the clear wording of letters of offer, that no commitment was made by the plaintiff beyond the option of having the first right of refusal to lease the proposed second building to be constructed on the six lots of land.

[189] In fact, of the three overdraft facilities granted to D1 to acquire six lots of land, only the first overdraft facility dated 23 December 1994 stated specifically that the acquisition of the shop houses was for the construction of a 16 storey office building.

[190] Further, only the overdraft facility dated 23 December 1994 states the following (the other overdraft facilities are silent):

> Upon completion of the project, the said office building will be let to Citibank Bhd as the main lessee or any other nominee of Citibank. Citibank shall have the first option to become the main lessee of the building for a period to be determined by Citibank.

[191] During DW1's cross-examination, DW1 agreed that:

(a) the 'the highest the plaintiff was prepared to go was to take up an option of the building was constructed';

(b) unlike the position in August 1988 where the various parties involved in the construction of Wisma CY had already entered into an agreement to build, the sublease, the main lease and the agreement in principle to finance the construction of Wisma CY, no such agreements were in place between December 1994 and January 1995; and

(c) there were no credit facilities and no building plans for construction of second building itself.

[192] During cross-examination, DW3 also stated that the plaintiff wanted to have an advantageous position vis-a-vis D1 and therefore made no commitment to D1 regarding the proposed new building.

[193] It might be noted that DW3 is uniquely placed to make this observation, since he was the one who liaised with the solicitors in the preparation of the facility agreement pursuant to the letter of offer.

[194] Further, in DW3's re-examination, he conceded that with regard to the facilities, that the plaintiff 'could not be tied down legally apart from the loan offered'.

[195] DW5 insisted in his evidence-in-chief that the proposed second building was to be built specifically for the plaintiff Citibank, but nonetheless conceded during cross-examination (in contrast to what happened with regard to Wisma CY) that:

(a) there were no agreements in place to take up the main or the sublease;

(b) there was no arrangement whereby the plaintiff would (purportedly) be in total control over the design and finishing of the building; and

(c) no architects were appointed to design the building.

[196] In his supplementary witness statement, DW5 pointed to the document at pp 35–46 of bundle P stating that it was a development order by City Hall ('DBKL') in respect of the construction of a new office lot.

[197] During cross-examination, however, DW5 admitted that the document he referred to:

(a) was an application to DBKL, and not a development order;

(b) showed that the area occupied by a bank would be 'basement 1 dan bawah';

(c) showed that floors 5–8 would be for offices; and

(d) only indicated 6.10% of the total floor area for a bank's use, but designated 56.78% of floor space for office use.

[198] Based on the above it is my finding that the proposed second building was a project for D1's own development, and not a second building for the plaintiff.

[199] The plaintiff did not dispute that it was interested in leasing the proposed second building for its own use to cater to its growing capacity. As such, an application was made to Bank Negara Malaysia ('BNM') on 6 December 1996 for approval to lease space in the said building (p 5 of bundle I). The application, however, was rejected via a letter dated 18 December 1996 (p 7 of bundle I).

[200] According to DW1's answers during cross-examination, the defendants were aware of the rejection, but still proceeded to acquire two shop houses anyway, as approved under the overdraft facility dated 9 April 1997.

[201] I agree with learned counsel for the plaintiff that this shows that the defendants were willing to continue with the acquisition the land required to construct the second proposed building, despite knowing that the plaintiff would not be able to lease the said building due to BNM's rejection.

[202] DW5 and DW6 argued in response that the only reason D1 continued to acquire the two shop houses was because Lian Yuen Fatt had told D1 that the plaintiff was confident of obtaining BNM approval through an appeal.

[203] There was an objection to the admissibility of this evidence as it is hearsay. Lian Yuen Fatt was not called as a witness. Lian Yuen Fatt purported to give a statutory declaration, but this was objected to by the plaintiff and this method of adducing evidence in a trial by way of a sworn statutory declaration shall be considered shortly.

[204] It would be presumptuous to suggest that if a regulatory body had rejected an initial application, the outcome of any appeal thereafter to the same body would be certain.

[205] DW3 also admitted during cross-examination that BNM might not approve the plaintiff's application and that the defendants were experienced enough to foresee such a possibility.

[206] D1 would also have been aware from the original Wisma CY and the express provisions in the building agreement dated 7 January 1988 that the plaintiff needed BNM approval for it to occupy any building for the purpose of conducting banking business.

[207] Therefore, I find that D1 would have and ought to have appreciated the risk of such approval not being given. The Director of D1 is D3, who is most familiar with regulatory approvals and he was in no way commercially naive.

[208] As pointed out by learned counsel for the plaintiff, the fact that Lai Yuen Fatt had told the defendants to proceed with the second building because the plaintiff was confident of their appeal to BNM would be a material fact of the representation and should have been pleaded but was not. This court would thus disregard this piece of evidence that is sought to be introduced.

[209] It cannot be overemphasised that parties must be held strictly to their pleadings otherwise the trial would be by ambush with new matters introduced as witnesses give their evidence in court, taking the other party by surprise. The Federal Court in *RHB Bank Bhd (substituting Kwong Yik Bank Bhd) v Kwan Chew Holdings Sdn Bhd* [2010] 2 MLJ 188 referred to the decision of *Menah Sulong v Lim Soo & Anor* [1983] 1 CLJ 26 where His Lordship Ong Hock Thye CJ said:

> I think it necessary in this case to emphasise once again that the courts should give their decision in strict compliance with the pleadings.

[210] In *UDA Holdings Bhd (formerly known as Perbadanan Pembangunan Bandar) v Melewar Leisure Sdn Bhd (formerly known as Harta Bumi Sdn Bhd)* [2009] 2 MLJ 408 it was reiterated that parties were bound by their pleadings and in the absence of pleadings, evidence if produced by the parties cannot be considered and no party shall be permitted to travel beyond its pleadings.

[211] DW5 also contended in his examination-in-chief that D1 was not informed that the application to BNM had been rejected until sometime in 1997. During cross-examination, however, DW5 contradicted himself by saying that DW1 informed D1 of the rejection soon after the plaintiff had received the rejection letter from BNM.

[212] The defendants contended that there was an understanding between D1 and the plaintiff whereby the rental paid by the plaintiff to lease the proposed second building would be used to off-set the repayment of the facilities granted to D1 to acquire the six lots of land.

[213] Since the plaintiff did not get the approval of BNM to lease the proposed second building, the said building was never built and therefore rental was never paid to D1. As such, D1 was deprived of its means of repaying the said facilities.

[214] I agree with learned counsel for the plaintiff that based on the terms and conditions of the letters of offer, D1 was under a clear obligation to repay the facilities whether or not the proposed second building was ever constructed. Indeed parties had applied their minds to this risk and possibility and so it was provided with regard to the overdraft facility dated 23 December 1994 and the facility agreement dated 4 January 1995 that:

(1) 'The Overdraft Facility would be restructured into a Term Loan with a tenure of 15 years in the event that 12 months after the date of first release of the facility, *no development and construction works had commenced on the project.*' (Clause 9 of the Letter of Offer at page 424 of Bundle E as well as subclause (2) of the Facility Agreement at page 443 of Bundle E) (Emphasis added.)

(2) The Plaintiff reserved the right to recall the facility on demand.

[215] During cross-examination, DW6 admitted that D1 would have to start repaying all the facilities even if no construction had commenced towards the building of the second building. DW3 also agreed upon cross-examination that the plaintiff had the unrestricted right to recall the banking facilities if the need arose.

[216] The plaintiff further submitted that D1 had enough funds to repay the outstanding facilities based on its current income, even without the rental that would have been obtained through the construction of the proposed second building.

[217] During cross-examination, DW3 agreed that:

(a) the RM4m overdraft facility was given on the basis that the existing rental paid by the plaintiff to D1 in respect of Wisma CY was sufficient to cover the instalment once repayment of the said facility commenced after the end of the 12th month; and

(b) the rental cash flow was enough to pay the instalments of RM44,713.21.

[218] The plaintiff argued in the alternative that even if the defendants were unable to service the loan facilities, much of it had to do with the defendants' own internal issues or struggles that were completely independent of any

actions taken by the plaintiff. As support for this proposition the plaintiff referred to the following letters from D1 to the plaintiff, which indicated that the defendants were facing financial difficulties well before the plaintiff moved out of Wisma CY:

(a) letter dated 6 July 1994 (p 3 of bundle I), appealing for a reduction in the monthly repayment towards the RM2.5m overdraft facility to operate and maintain Wisma CY;

(b) letter dated 9 November 1996 (p 1535 of bundle H) requesting the reinstatement of the RM2.5m overdraft facility by RM1m to pay outstanding assessment to DBKL;

(c) letter dated 29 July 1998 (p 10 of bundle I), requesting an advance of rental to assist D1 in paying the electricity bill;

(d) letter dated 3 February 1999 (p 11 of bundle I) requesting an advance of rental to fund payment of contractors and suppliers, as well as the lease rental due to the association;

(e) letter dated 3 February 1999 (p 12 of bundle I) requesting that the plaintiff defer the deduction of RM50,000 to pay contractors and suppliers, as well as the lease rental due to the association; and

(f) letter dated 3 May 1999 (p 15 of bundle I) requesting that the plaintiff defer the deduction of RM50,000 to pay the quarterly lease rental to the association.

[219] Based on the above submissions of the plaintiff, I have to reject the so-called second building representation advanced by the defendants.

THE POSITION OF A STATUTORY DECLARATION OF A WITNESS THAT WAS NOT CALLED

[220] On 19 December 2011, learned counsel for the defendants attempted to adduce a statutory declaration by Lian Yuen Fatt ('LYF') as evidence in lieu of viva voce testimony on the basis that he was medically unfit to give his evidence at trial.

[221] Learned counsel for the plaintiff objected to the admissibility of the statutory declaration.

[222] Order 38 r 1 of the Rules of the High Court 1980 ('RHC') provides that any fact that is required to be proved by a witness at a trial of an action begun by writ shall be proved by the examination of the witness orally and in open court. It is manifestly clear from the wording of the provision that the court shall not depart from O 38 r 1 under the provisions of RHC, the

Evidence Act 1950, or other written law relating to evidence. Hence, a statutory declaration declared pursuant to the Statutory Declaration Act 1960 cannot therefore be used to bypass O 38 r 1 of the RHC.

[223] The plaintiff submitted that the statutory declaration by LYF may only be admitted as evidence under the following provisions:

(a) O 39 r 1 of the RHC as evidence by way of deposition; or

(b) s 73A of the Evidence Act as documentary evidence.

[224] Order 39 r 1 of the RHC allows the court to make an order for evidence to be taken by way deposition where it appears necessary for the purpose of justice. Read together with O 38 r 9 of the RHC, this provision is an exception to the rule on viva voce testimony in O 38 r 1 of the RHC.

[225] An order of a court pursuant to O 39 r 1 of the RHC is a pre-requisite to the admission of evidence by deposition. Such order an order may be made by the court upon application by the defendants through summons to the registrar, or in very exceptional situations through ex parte summons.

[226] The defendants had proceeded to produce the evidence at the end of the last day of the trial without making the requisite application. Learned counsel for the defendants had known of the medical condition of LYF when the trial started but no attempt was made for an application under O 39 r 1 of the RHC. In the circumstance the evidence by way of a statutory declaration has to be rejected.

[227] Documentary evidence is admissible in the absence of the maker of the document under the circumstances provided under s 73A of the Evidence Act.

[228] It is a well-established principle that the court may disregard evidence, which although technically admissible, has a prejudicial value that outweighed its probative value. See *Lim Yew Seng v Hummel International Sports & Leisure A/S* [1996] 3 MLJ 7 at p 25 and *Goi Ching Ang v Public Prosecutor* [1999] 1 MLJ 507 at p 526.

[229] The plaintiff submitted that the statutory declaration, although tenuously probative to the facts in issue, is far too prejudicial to the plaintiff, and hence should not be admitted. The statutory declaration is highly prejudicial on the following bases:

(a) it contains statements which conflict contemporaneous documents adduced by the plaintiff and admitted in evidence by the court; and

(b) the statements are hearsay and the plaintiff would not have the opportunity to cross-examine LYF.

THE WEIGHT OF THE STATUTORY DECLARATION. IF ADMITTED

[230] Assuming, without conceding, that the statutory declaration is admitted in evidence, the plaintiff contended that the court must accord minimal weight to the evidence for the following reasons:

(a) the statement was not made contemporaneously to the facts stated;

(b) s 73A(6) of the Evidence Act concerns the assessment of weight of statement admitted under s 73A. It provides that regard shall be had to all the circumstances of the case, in particular, whether or not the statement was made contemporaneously with the occurrence or existence of the facts stated. The court is to accord minimal weight to evidence, which is not made contemporaneously;

(c) the statutory declaration of LYF contains statements averring the existence of certain facts or occurrence. These statements were not made contemporaneously with the occurrence or the facts stated, but were instead made after a lapse of several years, some, almost two decades later. Therefore, it was submitted that the court should give minimal weight with the statutory declaration;

(d) the statement is not subject to cross-examination. An out of court statement that is admitted will not be tested in cross-examination, and the court will not have the opportunity to observe the demeanour of the person making the statement; and

(e) case law has shown that the court will give minimal weight to statements which are not tested in cross-examination. See *Ng Chooi Kor v Isyoda (M) Sdn Bhd* [2010] 3 MLJ 492 and *Hong Leong Bank Bhd v Asakura Industry Sdn Bhd & Ors* [2011] 9 MLJ 723.

[231] In the circumstances I agree that the statutory declaration by LYF should not be admitted in lieu of viva voce evidence. To do otherwise will be contrary to express statutory provisions, and is manifestly prejudicial to the plaintiff. In any case, even if I were to admit it, very little weight can be attached to it in that it contradicts the written contracts entered into with respect to both the lease duration representation and the second building representation.

VIABILITY OF D1 AND D3'S COUNTERCLAIM AND THE FOUR RELATED SUITS BROUGHT BY THE ASSOCIATED COMPANIES

Limitation

[232] The claim for the increased outgoings and even increased rental by D1 under suit 1016 is time barred given that six years have passed since the purported demands (if any) were made. The relief sought by the associated companies under the four related suits are in respect of losses and damages that are claimed to have been sustained by the said companies arising out of the same having to make payments towards facilities in the name of D1. The claim by the associated companies is predicated upon the alleged collateral contract that was formed (which is denied) circa September 1999 to December 1999 and allegedly breached in 2001 when the sublease was terminated, is time barred in accordance with s 6 of the Limitation Act 1953 as the four related suits were commenced on 15 December 2008 which was after the limitation period for actions based on contract has set in. Accordingly, the principles set out in *Ambank (M) Bhd v Abdul Aziz bin Hassan & Ors* [2010] 3 MLJ 784; [2010] 7 CLJ 663 applies. In that case it was held that:

> According to the Federal Court in the case of *Nasri v Mesah* [1970] 1 LNS 85; [1971] 1 MLJ 32, that time begins to run for the purposes of limitation from the date of any infringement or threat of infringement of the appellant's right under the agreement. And that a cause of action on a contract accrues on the date of breach and in the case of actions founded on contract, time runs from the breach. Gill FJ delivering the judgment of the Federal Court had this to say at p 34 of the report:
>
> > A 'cause of action' is the entire set of facts that gives rise to an enforceable claim; the phrase comprises every fact which, if traversed, the plaintiff must prove in order to obtain judgment (per Lord Esher MR in *Read v Brown* (1889) 22 QBD 128, 131). In *Reeves v Butcher* [1891] 2 QB 509, 511, Lindley LJ said:
> >
> > > This expression, 'cause of action', has been repeatedly the subject of decision, and it has been held, particularly in *Hemp v Garland* [1843] LR 4 QB 519, decided in 1843, that the cause of action arises at the time when the debt could first have been recovered by action. The right to bring an action may arise on various events; but it has always been held that the statute runs from the earliest time at which an action could be brought.
> >
> > In *Board of Trade v Cayzer, Irvine & Co* [1927] AC 610, 617, Viscount Dunedin described 'cause of action' as that which makes action possible.

Now, what makes possible an action founded on a contract is its breach. In other words, a cause of action founded on a contract accrues on the date of its breach. Similarly, the right to sue on a contract accrues on its breach. In the case of actions founded on contract, therefore, time runs from breach (per Field J in *Gibbs v Guild* [1881] 8 QBD 296, 302). In the case of actions founded on any other right, time runs from the date on which that right is infringed or there is a threat of its infringement (see *Bob v Koklan & Ors* LR 57 IA 325). It would seem clear, therefore, that the expressions 'the right to sue accrues', 'the cause of action accrues' and 'the right of action accrues' mean one and the same thing when one speaks of the time from which the period of limitation as prescribed by law should run.

For the reasons I have stated, the period of limitation in the present case can be said to have begun to run only from the first clear and unequivocal threat to the plaintiffs right to a transfer of the land.

D1 AND D3'S COUNTERCLAIM AND THE FOUR RELATED SUITS BV THE ASSOCIATED COMPANIES

[233] The foregoing matters demonstrate that D1's counterclaim, that is essentially hinged on and buttressed upon the alleged oral representations, all of which no evidence can support, is non-viable and must accordingly be dismissed.

[234] Similarly, the four related suits, all of which are for losses and damages suffered by the associated companies and which are all predicated upon the identical arguments, namely the alleged representations made by the plaintiff, must be dismissed.

[235] In relation to D3's purported counterclaim, it can be found at paras 41–42 of the amended defence of D2, D3 and D4. D3 contended that:

(a) he is a director of D1 and D2;

(b) he allegedly lost his reputation in his business as a result of the events affecting D1 and D2;

(c) he has been allegedly 'blacklisted'; and

(d) he is unable to obtain financing from financial institutions.

[236] Apart from the fact that he is the director of D1 and D2 (which is not in dispute), the remaining contentions in D3's counterclaim are matters of fact.

[237] D3 does not have any evidential foundation as to the aforesaid matters of fact. In particular he has not led any evidence on:

(a) his alleged blacklisting;

(b) his alleged loss or reputation; and

(c) his alleged difficulty in obtaining financing.

[238] The failure to sustain the evidential aspects of this alleged counterclaim means the claim fails in to, without even any need to address the law.

[239] Without derogating from the above, the plaintiff further submitted that:

(a) there is no 'contract' of any kind in existence between the plaintiff and the D3 personally so as to make the plaintiff liable in contract; and

(b) the nebulous and ill-defined cause of action relied on does not fall within any recognised category of the law of tort such as establish or found a cause of action.

[240] Consequently, I agree that the counterclaim of D3 must fail in *limine* and ought to be dismissed.

FRAUDULENT MISREPRESENTATION CLAIM BY THE ASSOCIATED COMPANIES IN THE FOUR RELATED SUITS

[241] The classic formulation of the tort of fraudulent misrepresentation or deceit is found in the leading House of Lords decision of *Derry v Peek* (1889) 14 App Cas 337. Lord Herschell observed that in order to sustain such an action, there must be proof of fraud.

[242] Fraud is proved when it is shown that a false representation has been made:

(a) knowingly; or

(b) without truth in its belief; or

(c) recklessly, careless as to whether it be true or false.

[243] It should also be noted that the Federal Court decision of *Yong Tim v Hoo Kok Chong & Anor* [2005] 3 CLJ 229 makes it clear that the burden of proof in Malaysia with regard to fraud or misrepresentation is one of *beyond reasonable doubt*. The test in *Derry v Peek* above has been applied by our Federal Court in *Takako Sakao (f) v Ng Pek Yuen (f) & Anor* [2009] 6 MLJ 751.

[244] The associated companies contended that the plaintiff represented to them that they would be given indulgences with regard to the facilities and that no action would be taken against them until their facilities were restructured upon mutually favourable terms.

[245] The associated companies claimed further that such representations were made fraudulently, which resulted in the associated companies suffering both loss and damage. This is a claim that is unique to the four suits and is not mentioned in Suit 1016.

[246] The plaintiff's counsel submitted that such representations, even if they were made (which it is denied), would only constitute a statement of future intent on the part of the plaintiff. It is trite law that a statement of future intent is not a representation that is actionable in law.

[247] In *Beckett v Cohen* [1973] 1 All ER 120, Lord Widgery CJ stated that:

> '… (A) person who provides the service makes a promise as to what he will do, and that promise does not relate to an existing fact, nobody can say at the date when that statement is made that it is either true or false.

[248] *Beckett v Cohen* was followed by the Court of Appeal in *R v Sunair Holidays Ltd* [1973] 2 All ER 1233, where it was held at p 1236:

> In a civil action of deceit the plaintiff must prove that there was a false representation of fact as distinct from the failure to fulfil a promise.

[249] The propositions in both cases above were approved by the House of Lords in *British Airways Board v Taylor* [1976] 1 All ER 65.

[250] It was also held in *Ang Sin Hock v Khoo Eng Lim* [2010] 3 SLR 179; [2010] SGCA 17, in the context of fraudulent misrepresentation, that a statement of intention is not actionable, *unless it can be shown that the maker of the statement had not made the statement in good faith.*

[251] Based in the evidence and testimonies at trial, I agree with the plaintiff's submission that:

(a) the plaintiff's witnesses who allegedly made the fraudulent misrepresentations all categorically deny making such representations;

(b) the associated companies have not put forward convincing evidence that such representations were made;

(c) the question of whether such representations, if they were indeed made, were made not made in good faith was not put to any of the plaintiff's witnesses during cross-examination; and

(d) the associated companies have therefore not met the onus of proving beyond reasonable doubt that such representations, even if they were indeed made, would constitute an actionable claim against the plaintiff.

[252] I therefore dismissed the claims of the associated companies in the four related suits based on fraudulent misrepresentation.

PRONOUNCEMENT

[253] Having considered the evidence of all the witnesses called by the parties and the written submissions and clarification made, and for the reasons given above, I allowed the plaintiff's claim and dismissed the defendants' counterclaim and the claims of the associated companies in the four related suits.

[254] As for costs, the plaintiff through its learned counsel Mr Rabindra Nathan informed the court that it is not insisting on costs on a solicitor-client full indemnity basis. As such I awarded costs of RM200,000 for the present suit in Suit 1065 and RM10,000 each for each of the related suits. Allocator to be paid before extraction of certificate of costs.

[255] As for the security of RM100,000 deposited as costs with the defendants' solicitors, the same shall be released to the plaintiff's solicitors. However the defendants' solicitors shall be allowed to deduct a sum of RM20,000 being the estimated provisional costs of taking depositions in Singapore with respect to the plaintiff's witness WSC which costs was awarded to the defendants in any event.

A *Claim allowed and counterclaim and claims of associated companies dismissed.*

Reported by Ashok Kumar

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